Supreme Court, U.S.
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In The
Supreme Court of the United States

CLAUDIA NAVARRO PINEDA, ET AL.,

Petitioners,

v.

CITY OF HOUSTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Monell v. Department of Social Services*, 436 U.S. 658 (1978) should be reconsidered in favor of a rule of *respondeat superior* liability for municipalities in cases arising under 42 U.S.C. § 1983?

LIST OF PARTIES

Petitioners

Claudia Navarro Pineda
Ana Isabel Lores, as next friend of Ashley, minor daughter of Pedro Oregon Navarro
Blanca Lidia Viera, as next friend of Belinda, minor daughter of Pedro Oregon Navarro
Susana Oregon Navarro

Respondent

The City of Houston

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-21, is reported at 291 F.3d 325 (5th Cir. 2002). The opinion of the district court, Pet. App. 22-92, is reported at 124 F. Supp.2d 1057 (S.D. Tex. 2000).

JURISDICTION

The court of appeals' judgment was entered on May 9, 2002. A timely petition for rehearing was denied on August 13, 2002. Pet. App. 97-98. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

42 U.S.C. § 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * * ." 42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case raises an important and recurring question that four members of this Court already have expressed an interest in considering: Whether this Court should reconsider *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which established the rule that municipalities may be held liable for the acts of their agents under 42 U.S.C. § 1983 only if their agents act pursuant to an official "policy" or "custom."

This is a civil rights case arising from the shooting death of Pedro Oregon Navarro ("Mr. Oregon"). Six police officers burst into Mr. Oregon's home in the middle of the night, without a warrant or exigent circumstances, and shot him nine times in the back. Respondent, the City of Houston, admits that its officers violated the Fourth

Amendment. Pet. App. 100.[1] The Chief of Police called their actions "illegal" and candidly admitted that "he had never seen a case as 'egregious' as this one." Pet. App. 100.

The officers involved in this case were members of the Houston Police Department Gang Task Force. They were assigned to perform "zero tolerance" law enforcement in a high-crime area of Houston. Pet. App. 105. When the Gang Task Force was created, the Chief of Police ordered these officers to go "into the gray area, up to the line, of arrest, search, and seizure." Pet. App. 106. Even more bluntly, the Chief instructed the Gang Task Force officers to "push the envelope." Pet. App. 106.

On the occasion that led to this case, the Gang Task Force officers were conducting an unauthorized narcotics investigation. Pet. App. 101. The target of the investigation was a young Hispanic male named Rogelio, who lived with his brother, Mr. Oregon. Because they did not have a warrant or exigent circumstances, the officers devised a pretext to enter the Oregon apartment by force. Pet. App. 101. Upon entering in the middle of the night, several officers rushed to the rear of the Oregon apartment and kicked down Mr. Oregon's bedroom door, which was locked. There, they encountered Mr. Oregon. Pet. App. 102. Although the room was dark, some of the officers – but not all – later said they saw a gun. Pet. App. 103.

After one officer shot another in the back, the officers opened fire at Mr. Oregon. Pet. App. 103. Before the

[1] The Statement of Facts from Petitioners' brief in the court of appeals is reproduced in the Appendix, providing detailed references to the original record.

shooting ended, the officers fired over 30 shots at Mr. Oregon. Pet. App. 103. One of the officers even reloaded his weapon in order to continue firing at Mr. Oregon, who had fallen to the floor – face down – almost at the feet of the officers. This officer fired eight shots at point-blank range. Pet. App. 103.

When the shooting ended, Mr. Oregon lay dead in the doorway. Pet. App. 104. The autopsy reports confirmed that Mr. Oregon was shot in the back, at point-blank range, as he was lying prone on the floor. Pet. App. 104. Mr. Oregon was lying face down, with his hands "bent up and resting on each side of his head." Pet. App. 104.

The City subsequently conducted an internal affairs investigation which found the officers had violated the Fourth Amendment, and issued performance evaluations which concluded that the Gang Task Force officers had exhibited a "lack of knowledge" of the Fourth Amendment which had "resulted in the death of a citizen." Pet. App. 112-113.

Mr. Oregon's family sued the City of Houston and the police officers for violations of Mr. Oregon's constitutional rights under 42 U.S.C. § 1983. The Oregon family also sued for state-law wrongful death and survival remedies. The jurisdiction of the district court was invoked under 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

The district court granted summary judgment on the federal civil rights claims, holding that the Petitioners had failed to satisfy the "official policy or custom" test for municipal liability under 42 U.S.C. § 1983 established by *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

The court found that "plaintiffs have raised a genuine issue of material fact concerning whether the warrantless entries and searches evidenced in the summary judgment record represent a persistent, widespread practice of GTF officers which is so common and well settled as to constitute a custom that fairly represents municipal policy." Pet. App. 58-59. Inconsistently, however, the court found no evidence "either that municipal policymakers knew about that pattern of unconstitutional misconduct or that the warrantless entries and searches were so numerous or flagrant that constructive knowledge of them should be imputed to municipal policymakers." Pet. App. 62. Thus, the court granted summary judgment on the federal civil rights claims and dismissed the supplemental state-law claims with prejudice. It entered a Rule 54(b) order making that judgment final and appealable. Pet. App. 93-94.

The Court of Appeals for the Fifth Circuit affirmed the summary judgment on the federal civil rights claims and reversed the judgment on the supplemental state-law claims, dismissing them without prejudice. The court of appeals agreed with the district court that the Petitioners had failed to satisfy the *Monell* test. Pet. App. 4-18. The correctness of the court of appeals' decision is open to question, because that court refused to credit evidence that City policymakers deliberately disregarded the risks posed by the Gang Task Force. But that fact-bound application of *Monell* does not warrant review by this Court. Instead, the Petitioners ask this Court to reconsider *Monell*.

REASONS FOR GRANTING THE PETITION

For almost a quarter century, the federal courts have struggled to apply this Court's ruling in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which held that municipalities are not subject to *respondeat superior* liability under 42 U.S.C. § 1983. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. Although the *Monell* rule is easy to state in principle, it has proven nearly impossible to apply in practice.

It is time for the *Monell* rule to be reconsidered. *First*, four members of this Court already have expressed an interest in overruling *Monell*. *Second*, the question is squarely presented in this case, and there are no procedural or jurisdictional barriers to deciding it. *Third*, *Monell* is incorrect, and the time is right to reconsider it. Over the last 25 years, the *Monell* rule has proved unworkable in practice, and a wealth of scholarly commentary has demonstrated that it is unsound in principle. It should be reconsidered.

I. Four Members of the Court Already Have Expressed an Interest in Deciding This Question.

Four members of the Court recently expressed an interest in reconsidering *Monell*. In *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), Justice Breyer (joined by Justices Stevens and Ginsburg) issued a thoughtful dissent surveying the

dubious origins and the difficult history of the *Monell* rule. *Id.* at 430-37. Justice Breyer called on the Court to reconsider *Monell* and invited future argument about "the continued viability of *Monell*'s distinction between vicarious municipal liability and municipal liability based upon policy and custom." *Id.* at 437.[2] In a separate dissent, Justice Souter echoed Justice Breyer's "powerful call to reexamine § 1983 liability afresh." *Id.* at 430 (Souter, J., dissenting). Thus, four members of the Court have expressed an interest in deciding the question presented in this case.

Because this question already has been identified as worthy of consideration by four members of the Court, the Petitioners will not belabor the merits, but will simply identify the reasons this case is an appropriate vehicle to address the question.

II. The Question Is Preserved and Squarely Presented in This Case.

This case is an ideal vehicle to reconsider *Monell*. The Petitioners have preserved this question at every stage of the litigation – both in the district court, Pet. App. 115, and in the court of appeals. Pet. App. 112.

The question is squarely presented. The Gang Task Force officers were undeniably employees of the City who were acting within the course and scope of their employment, and the City has conceded that the warrantless

[2] Justice Stevens has long contended that *Monell* is unsound. *See, e.g., Oklahoma City v. Tuttle*, 471 U.S. 808, 834-44 (1985) (Stevens, J., dissenting).

search that resulted in the fatal shooting of Mr. Oregon was a violation of the Fourth Amendment. Pet. App. 100. Because those are the only facts that are necessary to establish *respondeat superior* liability, this case is an excellent vehicle to consider whether a rule of *respondeat superior* should be adopted for cases arising under 42 U.S.C. § 1983.

Finally, because this case cleanly presents the issue in a summary judgment context, without any factual disputes or unusual circumstances that would complicate the decision, this case is an ideal vehicle to announce a new rule of general application for Section 1983. The *Monell* issue recurs in literally thousands of cases every year, and it regulates the conduct of every municipality in the country. Thus, the question is of great significance, and it should be resolved in a case that permits the Court to address the question in detail without being distracted by factual disputes or ancillary issues. Because the relevant facts are undisputed and there are no other issues, this case is an ideal vehicle to address this important and recurring question.

III. The Time is Right to Reconsider *Monell*.

Over the last 25 years, a powerful argument has emerged in favor of reconsidering *Monell*. After a generation of experience under the *Monell* rule, it has become apparent that *Monell* is unworkable in practice, and it is unsupported by any sound theoretical basis. Additionally, a generation of scholarship reveals that *Monell* was wrong when it was decided. The time is right to reconsider *Monell* and adopt a rule of *respondeat superior*.

A. A Generation of Experience Proves the *Monell* Rule Is Unworkable.

Despite heroic efforts by the federal courts, the *Monell* rule has proved unworkable. After announcing its abstract rule in *Monell*, this Court did not attempt to define "what the full contours of municipal liability under § 1983 may be." *Monell*, 436 U.S. at 695. Instead, the Court left "further development of this action to another day." *Id.* That day has come – again, and again, and again – but the Court never has succeeded in fashioning a satisfactory framework to apply the *Monell* rule. This is no accident; it is the inevitable result of the fact that *Monell* is inherently unsound.

In the years since *Monell*, the Court has returned several times to the question of municipal liability under Section 1983, struggling to define official "policy" or "custom" in a satisfactory manner. Justice Breyer charitably characterized the fruits of that labor as "a body of interpretive law that is so complex that the law has become difficult to apply," rendering the basic rule of *Monell* "obsolete and a potential source of confusion." *Brown*, 520 U.S. at 430 (Breyer, J., dissenting).

For example, the Court has struggled to articulate a neutral principle for deciding when the isolated acts of an individual officer may be said to reflect an official policy. This question has divided the Court repeatedly, and no answer has proved satisfactory. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (holding that official policy may be formed by an isolated decision of the highest officer responsible for making policy in a particular area); *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (fractured Court holding that the acts of a low-ranking

officer with authority to act in a single case do not automatically result from official policy); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (fractured Court debating whether the actions of those with authority to make final decisions in a single case constitute the official "policy" of a municipality); *City of St. Louis v. Prapotnik*, 485 U.S. 112 (1988) (fractured Court debating the test for "policymakers" under *Monell*). Although the Court's attention has been drawn away from that hopeless task in recent years, the lower courts that must apply the *Monell* rule do not have that luxury. Reconsidering the *Monell* rule would end the fruitless search for official "policymakers" in every Section 1983 case.

Likewise, the Court has struggled to define a neutral principle by which the *Monell* requirement of official policy or custom may be applied to cases involving omissions. That inquiry has led to a subset of official policy known as "deliberate indifference," which poses its own analytical challenges. *See City of Canton v. Harris*, 489 U.S. 378 (1989); *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997). Adopting a rule of *respondeat superior* in lieu of *Monell*'s requirement of an official policy or custom would end the absurd search for a "policy" of "deliberate indifference."

The *Monell* rule also has resulted in a highly stylized jargon to explain the causation test in cases arising under Section 1983, in an attempt to explain when an official policy or custom may fairly be said to "cause" a plaintiff's injury. The causation standard has been described variously as requiring proof that the policy was a "moving force," *Monell*, 436 U.S. at 694, *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); an "affirmative link," *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985); a "direct

causal link," *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); or most recently, that the plaintiff's injury was a "plainly obvious consequence" of the official policy. *Brown*, 520 U.S. at 411. These shifting verbal formulations are symptoms of a deeper problem – they illustrate that the effort to define a causal link between a municipal "policy" and a plaintiff's injury, without any reference to the acts of the human agent who caused the injury, is a futile task. Reconsidering *Monell* would eliminate the need for these semantic games.

All these line-drawing exercises have been thought necessary to defend the *Monell* rule and to avoid the specter of "municipal liability collapsing into *respondeat superior*." *Brown*, 520 U.S. at 410. But the result is a byzantine series of rules that defies any coherent explanation or consistent application. The subtle distinctions drawn by this Court's cases leave lower courts – and municipal officials – with the unenviable task of complying with verbal formulations that, "while adding complexity, do not seem to reflect a difference that significantly helps one understand the difference between 'vicarious' liability and 'policy.'" *Brown*, 520 U.S. at 434 (Breyer, J., dissenting).

Although these carefully nuanced legal distinctions may be intellectually intriguing, they are not well-suited to a body of law that must guide the decisions of lower courts and lay officials nationwide. Because these subtle distinctions are difficult to apply evenly, they create the intolerable spectacle of similarly-situated litigants being treated differently in different cases. *See Brown*, 520 U.S. at 435 (Breyer, J., dissenting) (citing cases). That is not the hallmark of a healthy legal rule. Thus, the recognition that "*Monell*'s basic effort to distinguish between vicarious

liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply," *id.* at 433 (Breyer, J., dissenting), is tantamount to a confession that the *Monell* rule is a failure. As Justice Breyer observed, "a basic legal principle that requires so many such distinctions to maintain its legal life may not deserve such longevity." *Id.* at 435 (Breyer, J., dissenting).

B. There Is No Sound Theoretical Basis for the *Monell* Rule.

Monell is one of the most widely-discussed decisions of the last generation, and it has produced a vast body of scholarship demonstrating that there is no sound theoretical basis for the *Monell* rule. This scholarship would provide a rich resource for the Court in deciding whether to adopt a rule of *respondeat superior* for Section 1983.

A groundswell of academic commentary has called on the Court to revisit *Monell*. Most scholars advocate that *Monell* be reconsidered in favor of a *respondeat superior* rule. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 94-95 & n.31 (1999) (citing academic literature); John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 262 & n.16 (2000) (same). Although this issue has been debated in legal scholarship for years, *e.g.*, Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 756 (1992); Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1019 (1990); Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 1000-02 (1989), the

question continues to command a great detail of scholarly attention. *See generally Symposium: Section 1983*, 48 DEPAUL L. REV. 773 (1999) (discussing the current state of Section 1983 doctrine and various proposals to change it).

For example, *Monell* is criticized because it is inconsistent with modern economic rationales based on internalizing costs and maximizing incentives for optimal deterrence. *See, e.g.*, Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 300-01; Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 229-30 (1986) (urging enterprise liability for constitutional torts); Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 49-50 (1980) (arguing that imposing enterprise liability would induce the "systemic changes" necessary to correct many constitutional injuries); Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2024 (1998) (arguing that *respondeat superior* would compensate victims, spread losses, and enhance deterrence).

Monell's byzantine rules for identifying "official policy" also have been criticized because they ignore the practical realities of municipal policymaking, Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753 (1989), as well as the practical realities of modern litigation. *See* G. Flint Taylor, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DEPAUL L. REV. 747 (1999).

Finally, *Monell* also has been criticized because it erects a barrier to compensation of deserving victims, perpetuating an intolerable gap between constitutional

rights and remedies. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 94-95 & n.31 (1999) (citing Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 631). That criticism resonates with this Court's recognition, just two years after *Monell*, that compensating victims was the "central aim" of Section 1983 and that the statute was intended "to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 650-52 (1980). *Monell* frustrates those aims at the expense of both individual victims and the body politic.

C. *Monell*'s Reliance on Legislative History Was Mistaken.

Finally, the Court should not consider itself constrained by the original holding of *Monell*, which relied heavily on an interpretation of the legislative history behind the passage of Section 1983. As several members of this Court have repeatedly emphasized, that is a dangerous approach to a question of statutory construction. The *Monell* example bears out that warning.

Justice Stevens has criticized *Monell*'s reading of the legislative history for years, contending that the text and legislative history of Section 1983 actually support a *respondeat superior* rule. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 834-44 (1985) (Stevens, J., dissenting); *see also Brown*, 520 U.S. at 431-32 (Breyer, J., dissenting, joined by Stevens and Ginsburg, JJ.) (discussing Justice Stevens' position).

Over the last generation, a scholarly consensus has confirmed Justice Stevens' view. It is now generally understood that *Monell's* interpretation of the legislative history was incorrect. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 52 n.21 (1998). As one prominent scholar has observed:

> Anyone who spends time with the Court's investigations of that history [of Section 1983] will find them at least opportunistic. *Monell* is a particularly rich example. First, it reversed the Court's earlier and unanimous conclusion, based equally on the history of the 1871 Act, that "person" did not include municipality. *See Monroe v. Pape*, 365 U.S. 167, 187-92 (1961). Second, the *Monell* Court found in that same history a requirement, for municipal liability, of an official "policy or custom" supporting the unconstitutional act. This is the same sort of showing that the *Monroe* Court, over Justice Frankfurter's dissent, refused to require for any other "person" who might be sued under § 1983. Thus, we are told that the 42d Congress simultaneously intended to require proof of an official policy or custom in order to hold a municipality liable as a "person" acting "under color of any statute, ordinance, regulation, custom or usage" of state law (R.S. §§ 1979, 42 U.S.C. §§ 1983), but to dispense with this requirement for any other kind of "person" sued under the same provision. [These holdings] are not a persuasive reading of the historical record adduced in the Court's opinions.

John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 86 n.24 (1989).

This opinion is shared by a number of scholars of differing intellectual viewpoints. *See, e.g.*, David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1; Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 101 (1989); Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 541 (1989); Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987); Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517 (1987); Charles A. Rothfeld, Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 956-57 & n.97 (1979); Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 54 (1986). This case is an appropriate occasion to correct *Monell*'s misreading of history.

Petitioners do not wish to belabor the merits at this stage, but wish only to point out that there is a substantial body of respected authority suggesting that *Monell* is incorrect, as well as a rich source of information upon which the parties and the Court will be able to draw in answering this important question. The time has come to reconsider *Monell*, and this case is an appropriate vehicle to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20189

CLAUDIA NAVARRO PINEDA, Etc; ET AL,

Plaintiffs

CLAUDIA NAVARRO PINEDA, Individually, Representative of the Estate of Pedro Oregon Navarro; ANA ISABEL LORES as next friend of Ashley, minor daughter of Pedro Oregon Navarro; BLANCA LIDIA VIERA, as Next friend of Belinda, minor Daughter of Pedro Oregon Navarro; SUSANA OREGON NAVARRO,

Plaintiffs Appellants,

versus

CITY OF HOUSTON; ET AL,

Defendants,

CITY OF HOUSTON

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas.

(Filed May 9, 2002)

Before KING, Chief Judge, and GARWOOD and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Houston police officers shot and killed Pedro Oregon Navarro following an unconstitutional warrantless entry into his residence. Members of his family filed this suit asserting a § 1983 claim against the City of Houston, as well as supplemental state claims. The district court granted summary judgment to the City on the § 1983 claim and dismissed the supplemental claims with prejudice. This appeal followed. We affirm the grant of summary judgment as to the § 1983 claim and modify the order dismissing the state claims to provide that those claims are dismissed without prejudice.

I

On July 11, 1998, Houston police officers and members of the Southwest Gang Task Force Pete Herrada and J.R. Willis were patrolling in southwest Houston when they stopped a car for a traffic violation.[1] This stop led to the arrest of the driver, Ryan Baxter, who volunteered to give information about his drug supplier, a person called Rogelio, in exchange for lenient treatment. The two officers contacted the other members of the SWGTF. Sergeant Darrell Strouse and officers David Perkins, Lamont Tillery, and David Barrera, also members of the task force, joined Herrada and Willis. Together they devised a plan for expanding the catch.

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[1] The facts of this case are set out in more detail in our recent decision in *United States v. Strouse*, No. 00-20558, 2002 WL 433160 (5th Cir. Mar. 20, 2002).

By the initial plan Baxter was to meet Rogelio at a local fast-food establishment, setting up a search of his car. It didn't work – Rogelio did not appear. Baxter paged Rogelio again, this time confirming that Rogelio would be at his apartment and would make the sale there. The officers went to the apartment, but no one was home. After waiting until 1:30 a.m. on July 12, the officers returned to the apartment and, without obtaining a search warrant, had Baxter knock on the door. When the door opened, Baxter dropped to the ground and the GTF officers, waiting at the foot of the stairs, rushed into the apartment. There were several people in the apartment, and in the commotion one of the officers apparently shot another in the back, followed by a fusillade from the officers killing Pedro Oregon Navarro. A pistol found near Oregon's body was identified as belonging to Oregon.[2]

II

We review the district court's grant of summary judgement *de novo*.[3]

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[2] The plaintiffs' opening brief states that "[a] pistol was found near Mr. Oregon's body, identical to one Officer Tillery carried as his second, personal gun." Appellants' Brief at 9. The City, however, notes that Rogelio Oregon Navarro testified that the pistol belonged to his brother Pedro. R. at 2226. *See also Strouse,* 2002 WL 433160 at *2 (noting that Oregon possessed a gun).

[3] *Starkman v. Evans,* 198 F.3d 173, 174 (5th Cir. 1999).

A

First, the rote. Section 1983 offers no *respondeat superior* liability. Municipalities face § 1983 liability "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . ."[4] Proof of municipal liability sufficient to satisfy *Monell* requires: (1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose "moving force" is that policy (or custom).[5]

Early cases following *Monell* dealt with official policies or acts by a governing body fairly attributable as the acts of the local government itself.[6] In those cases, "there was no question but that the objectionable conduct was city policy."[7] Treating claimed municipal liability in the absence of a "smoking gun" we marked two paths of proof:

> 1. A policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or

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[4] *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 694 (1978).

[5] *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

[6] *See Monell*, 436 U.S. at 658 (discussing policy of New York City that essentially forced pregnant employees to take leaves of absence without pay); *Owen v. City of Independence*, 445 U.S. 622, 633 (1980) (finding no immunity for city where city council released to public allegedly false statement impugning police chief's honesty).

[7] *Bennett v. City of Slidell*, 728 F.2d 762, 766 (5th Cir. 1984) (en banc).

> 2. A persistent, widespread practice of city officials or employees which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.[8]

The plaintiffs here claim two theories of liability: (1) an unwritten municipal custom of warrantless searches of residences in violation of the Fourth Amendment; and (2) inadequate training.

B

1

Turning to the claim that the SWGTF engaged in a pattern of unconstitutional searches pursuant to a custom of the City, we note first that one act is not itself a custom.[9] There must be a "persistent and widespread practice."[10]

The effort to create a triable fact issue regarding custom was creative and took the following form. From

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[8] *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (en banc); *see also Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 405-07 (1997).

[9] *Piotrowski*, 237 F.3d at 581.

[10] *Id.*

5,000 offense reports produced by the City in discovery, counsel selected approximately 500 involving narcotics. These were the predicate for opinion evidence on custom by their expert witnesses. While the opinions offered referred to a greater number of incidents, the district court considered only those accompanied by offense reports in the summary judgment record. The district court relied upon 11 of the reports of a warrantless entry into residences by the SWGTF.[11] The plaintiffs urged that this evidence met their summary judgment burden.

The district court was persuaded that these 11 (of 13) incidents for which there were offense reports in the summary judgment record were competent summary judgment evidence of a pattern of unconstitutional searches – enough to defeat summary judgment for want of proof of custom.[12] We are not persuaded that this proof creates a fact issue on the issue of a pattern of conduct.

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[11] The experts cited to more than the 13 incidents reported by the district court in its table. The offense reports did not accompany the experts' citation to those incidents and the district court therefore did not consider incidents beyond those 13. One expert cited 33 warrantless entries into residences and the other cited 17 in their affidavits.

[12] The 13 incidents were broken down as follows. In 5 incidents the officers reported consent as the applicable exception to the warrant requirement. The district court accepted these incidents as competent summary judgment evidence of unconstitutional searches. In 7 incidents "exigent circumstances" were cited. Three of these involved pursuit, three involved the smell of burning drugs, and one the spotting of contraband in plain view by officers. The district court accepted these incidents as well. In the last report, there was no Fourth Amendment interest, as the arrestee was a trespasser. *See Pineda v. City of Houston*, 124 F. Supp. 2d 1057, 1070-77 (S.D. Tex. 2000). The district court did not consider one of the "exigent circumstances" incidents, because it occurred in March 1999, *after* the shooting at issue in this case.

Eleven incidents each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation's largest cities and police forces. The extrapolation fails both because the inference of illegality is truly uncompelling – giving presumptive weight as it does to the absence of a warrant – and because the sample of alleged unconstitutional events is just too small. Opinion evidence resting heavily on this data added little if anything. Left without legs, the opinions were little more than suspicion, albeit by informed persons. The weakness in the approach is apparent in its practical effects. It requires the City to defend "cases within cases" from historical records to justify searches conduced [sic] without a warrant. The burdens of proof on a contested warrantless entry of a home have little to do with the use here of the City's records. The district court was wisely wary. Although the district court went further than we think the record warrants its decision on this point was a nigh arguendo ruling; allowing it to move to an even weaker link in the proof.

2

Even if this proof was, contrary to our view, sufficient to create a disputed issue of fact on custom, there remains the burden of demonstrating actual or constructive knowledge of the policy-making official for the municipality:[13]

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[13] The plaintiffs argue that there is no distinction between proof of a pattern of unconstitutional conduct sufficient to constitute a customary policy and proof of constructive knowledge of such a policy. The cases do not support this argument. *See, e.g., Bennett,* 728 F.2d at 768; *see also Piotrowski,* 237 F.3d at 578-79 (noting that liability requires

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> Actual knowledge may be shown by such means as discussions at council meetings or receipt of written information. Constructive knowledge may be attributed to the governing body on the ground that it would have known of the violations if it had properly exercised its responsibilities, as, for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity.[14]

The plaintiffs do not allege that the policymakers for the City, the Police Chief and his Assistant Chiefs, had actual knowledge of the pattern of unconstitutional searches relied upon by the district court. Instead they argue that the pattern of unconstitutional searches by the SWGTF is sufficient to survive summary judgment because it was widespread enough to impute constructive knowledge to the policymakers.

We are not persuaded. First, the weakness in proof of any pattern of illegalities aside, the plaintiffs provided no evidence that the incidents were the "subject of prolonged public discussion or of a high degree of publicity."[15] Rather

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actual or constructive knowledge on the part of municipal policymaker); *Webster,* 735 F.2d at 842 ("Actual or constructive knowledge of [a] custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policy-making authority."). A pattern may exist without actual or constructive knowledge because the facts of the events are concealed from policymakers. However, the sheer numerosity of incidents *can* provide evidence of constructive knowledge. *See* note 15.

[14] *Bennett,* 728 F.2d at 768.

[15] *Id.; McConney v. City of Houston,* 863 F.2d 1180, 1184 (5th Cir. 1989) ("Sufficiently numerous prior incidents of police misconduct, for

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they urge that any municipality that collects numerous offense reports, a small proportion of which include warrantless searches ostensibly, from the investigating officer's perspective, within an exception to the Fourth Amendment's warrant requirement, maintains not only a custom of unconstitutional searches, but that knowledge of this should be imputed to the municipal policymakers. This is functionally the *respondeat superior* regime the Supreme Court has repeatedly rejected.[16]

Second, the plaintiffs provide opinion evidence that the offense reports and number of warrantless searches performed by the SWGTF sent a clear signal to supervisors and policymakers that a pattern of unconstitutional behavior existed within the SWGTF.[17] Such opinions as to

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example, may tend to prove a custom *and* accession to that custom by the municipality's policymakers. Isolated instances, on the other hand, are inadequate to prove knowledge and acquiescence by policymakers.") (emphasis added); *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir. 1987) ("Constructive knowledge may be inferred from the widespread extent of the practices, general knowledge of their existence, manifest opportunities and official duty of responsible policymakers to be informed, or combinations of these.")

[16] *See, e.g., Bryan County*, 520 U.S. at 410 ("To prevent municipal liability . . . from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.").

[17] *See, e.g.*, Affidavit of Thomas Parker, R. at 4172 ("The command staff and operational managers and supervisors of the Houston Police Department essentially ignored the abundant and significant warning signs of such unauthorized and illegal enforcement tactics by members of the GTF, allowing such tactics to become tacitly approved – though illegal and unwritten – standard operating procedures."); Affidavit of James Fyfe, R. at 4409 ("By my assessment . . . these involvements included apparent improper police behavior that should have been apparent to reviewing supervisors and HPD administrators.").

whether or not policymakers had constructive knowledge do not create a fact issue, as the "experts" were unable to muster more than vague attributions of knowledge to unidentified individuals in "management" or the "chain of command."[18] In fact, the offense reports were summarized and presented in digest form and the plaintiffs' experts failed to demonstrate how the unconstitutionality of the reported searches could be gleaned from these summary reports. All of this assumes that policymakers may not rely on the representations of police officers as to the existence of an exception to the warrant requirement.[19] These offense reports are insufficient to establish *actual* knowledge of a pattern even in the hypothetical case that the plaintiffs provided proof that the policymakers had read the *individual* reports. It follows, then, that there can be no constructive knowledge of an unconstitutional custom from the reports passing through the "chain of command" in summary form.[20]

Finally, the plaintiffs cite the First Circuit's decision in *Bordanaro v. McLeod,*[21] finding knowledge where the

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[18] Fyfe Affidavit, R. at 4408; Parker Affidavit, R. at 4187.

[19] For example, the policymakers would plainly have been entitled to rely on "consent" as an exception to the warrant requirement. This would leave only 7 incidents for which district court found the plaintiffs had presented competent summary judgment evidence of unconstitutional searches.

[20] The City notes that large police departments use other methods to monitor police misconduct such as investigating community complaints, monitoring changes in the number of dismissals of cases by the District Attorney, and communication with the District Attorney. *See* Appellee's Brief at 18-19.

[21] 871 F.2d 1151 (1st. Cir. 1989).

policymaker "utilized an extensive report review process to monitor the conduct of his officers and to ensure their compliance with the rules of the department."[22] That police department was vanishingly small in comparison to the HPD, considering that the entire night watch consisted of just *five* police officers.[23] The case is not comparable to the 7, or fewer, instances of unconstitutional searches out of the 500 narcotics and search-related instances in 5000 offense reports from the SWGTF.[24]

We conclude that the plaintiffs have failed to present a genuine issue of material fact on their "custom of unconstitutional residence searches" theory. We now turn to the claim of inadequate training.

C

"It is clear that a municipality's policy of failing to train its police officers can give rise to § 1983 liability."[25] In order to establish the City's liability, the plaintiffs must show (1) inadequate training procedures; (2) that inadequate training caused the task force officers to shoot Oregon; and (3) the deliberate indifference of municipal policymakers.[26] As we will explain, the plaintiffs have

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[22] *Id.* at 1157.

[23] *Id.*

[24] These offense reports were from the period of approximately November, 1993 to December, 1999.

[25] *Brown v. Bryan County,* 219 F.3d 450, 457 (5th Cir. 2000) (citing *City of Canton v. Harris,* 489 U.S. 378, 390 (1989)).

[26] *Id.; Conner v. Travis County,* 209 F.3d 794, 796 (5th Cir. 2000).

failed to raise a genuine issue of material fact as to inadequate training and causation, and do not reach the question of sufficiency of evidence of deliberate indifference.

1

The plaintiffs must raise a genuine issue of material fact with respect to whether the training procedures for GTF officers, which were identical to those employed for other uniformed patrol officers, were inadequate. "In resolving the issue of a city's liability, the focus must be on [the] adequacy of the training program in relation to the tasks *the particular officers must perform.*"[27] The inadequacy of training must be closely related to the injury.[28]

The plaintiffs argue that the GTF officers were consistently engaged in narcotics investigations that require specialized training and that the lack of a mission statement and standard operating procedures for the GTFs created confusion as to their function.

According to the summary judgment record, former Police Chief Nuchia stated publicly that "undercover narcotics work and dealing with informants and search warrants are complex tasks, requiring special knowledge and skills." The plaintiffs also presented the testimony of Chief Bradford that specialized narcotics investigations involve confidential informants, case-related informants, and covert and plainclothes operations. To support their

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[27] *City of Canton*, 489 U.S. at 390 (emphasis added).

[28] *Burge v. Parish of St. Tammany*, 187 F.3d 452, 472 (5th Cir. 1999).

view that GTF officers were confused about their role, the plaintiffs also provide the testimony of Kimbra Ogg, the then-director of the Mayor's Anti-Gang Office that (a) GTF members were confused about their role in narcotics investigations; (b) her belief that GTF officers were not adequately trained; (c) her fear that zero tolerance policing put the GTF officers in confrontational situations with citizens; and (d) that she, at least twice, voiced her concern to HPD command staff members.

The plaintiffs have not raised a fact issue on the inadequacy of training with this evidence. First, except as it relates to Fourth Amendment violations and training, none of this is relevant to the plaintiffs' inadequate training theory. For instance Kimbra Ogg's testimony is devoid of references to officer misconduct and merely repeats her vague feeling that there was a "confrontation" for which the officers required more training. It is apparent from her deposition that the training she is referring to relates to sensitivity to community concerns. Additionally, Ogg admitted she had no notion that GTF officers were conducting warrantless searches, and thus her conclusions about training are inapposite.[29]

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[29] *See* Ogg Deposition at 40 ("Generally, what would happen is: Police officers would call, they would desire to attend some kind of gang training, usually held by somebody outside the Houston Police Department. They would call us, to try and help them get funding to attend these trainings. Sometimes we were able to; sometimes we weren't."). Additionally, on cross-examination Ogg admitted to having no knowledge of any pattern of Fourth Amendment violations by GTF officers or their participation in "buy-busts." *Id.* at 77-80. Finally, with reference to the "confusion" about the role of the GTF, Ogg admitted that no GTF officer ever told her that he was

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Second, even when viewed in a light most favorable to the plaintiffs, the evidence cannot establish that the officers were untrained in the Fourth Amendment's warrant requirement and the necessity of an exception to a warrantless search. In fact, the manner in which the officers filled out the offense reports that the plaintiffs rely upon for their "pattern" theory belies the notion that the officers were untrained in basic Fourth Amendment law.

The summary judgment record cannot support the plaintiffs' assertion that the training the SWGTF officers received was inadequate. The plaintiffs presented no evidence regarding additional training the SWGTF officers should have received that would have prevented the incident here – they only repeat that "specialized narcotics training" was required, without ever defining the content of that statement. This conflates the issue of whether GTF officers were performing certain types of unauthorized investigations with whether they were properly trained in Fourth Amendment law. The plaintiffs must create a fact issue as to the inadequacy of the Fourth Amendment training received by GTF officers. The plaintiffs do not allege, and do not provide evidence, that the officers were so untrained as to be unaware that warrantless searches of residences absent an applicable Fourth Amendment exception, such as consent, were unconstitutional.[30] And

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allowed to enter a residence without a warrant to conduct a search for narcotics. *Id.* at 83-84.

[30] The plaintiffs cite to the HPD evaluation of the officers, which found that their conduct "exhibited" a lack of knowledge of Fourth Amendment procedures. *See* Appellants' Brief at 41-42. The City, however, correctly notes that this evaluation says nothing about the *training* that the officers received. *See* Appellee's Brief at 40 n.8.

we think that ignorance of such basic rules is most unlikely.

This stands in marked contrast to *Brown v. Bryan County* [31] and *City of Canton v. Harris.*[32] In *Bryan County* the deputy who caused the plaintiff's injury had received *no* training in proper pursuit and arrest techniques. In *City of Canton* the officer had received rudimentary first-aid training, but allegedly not enough to recognize a detainee's serious illness. There is no evidence in the summary judgment record to indicate that the SWGTF officers' Fourth Amendment instruction was deficient as to when warrantless searches could be performed. Without this evidence plaintiffs cannot survive summary judgment. This is nothing new:

> Neither will it suffice to prove than [sic] an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. *And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.*

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[31] 219 F.3d 450, 457 (5th Cir. 2000).

[32] 489 U.S. 378, 390 (1989).

> Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury.[33]

The Seventh Circuit's decision in *Palmquist v. Selvik*[34] is instructive. In *Palmquist,* police officers were allegedly not trained to deal with "abnormally behaving" individuals. The Seventh Circuit found that the plaintiff failed to establish inadequate training because, while there was no special training in how to deal with such individuals, a rule of "no special training = deficient training" must be rejected because it "would ignore the training the officers did receive . . . [in] basic recruit training. . . ."[35] The plaintiffs here also have ignored the basic training the GTF officers received.

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[33] *City of Canton,* 489 U.S. at 391 (emphasis added).

[34] 111 F.3d 1332 (7th Cir. 1997).

[35] *Id.* at 1345. *Cf. Brown v. Gray,* 227 F.3d 1278, 1286-87 (10th Cir. 2000) (disposing, in § 1983 case arising out of actions of off-duty police officer in city with always-on-duty policy, of city's argument that plaintiff had presented no evidence that training was inadequate other than the incident (a shooting) itself, by noting evidence of: (1) lack of distinction in officer training between on-duty and off-duty situations; and (2) expert testimony that risks and circumstances were different and required different training for off-duty police.). In this case, by contrast, the plaintiffs' merely state and re-state that "because the City has admitted that specialized training is required for officers in such situations [specialized narcotics investigations], there is sufficient evidence that the training was inadequate." Reply Brief at 21. No butterfly will emerge from this hollow chrysalis of an argument.

This flaw in the plaintiffs' case can also be viewed as a failure to provide evidence of causation. The requirements of proof of inadequacy of training and causation are, in many respects, intertwined.[36] In *Palmquist,* as here, the plaintiff relied upon expert testimony that did not include any reference to the relevant training that the offending officers had actually received, a flaw the Seventh Circuit found fatal.[37] In this case, the plaintiffs' experts do not reference the Fourth Amendment training the officers had received prior to the shooting. Even assuming the plaintiffs have created a genuine issue of material fact as to whether or not GTF officers were performing narcotics investigations in violation of HPD policy, and that GTF officers were not adequately trained to perform such investigations,[38] that does not mean that their lack of training *caused* the injury to Oregon, which for these purposes we assume was the result of a warrantless search of a residence in violation of the Fourth Amendment. There is no competent summary judgment evidence of any causal relationship between any shortcoming of the officers' training regarding warrantless searches of residences and the injury complained of. Viewing the evidence in the light most favorable to the plaintiffs, the record fails

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[36] *See, e.g., Palmquist,* 111 F.3d at 1345-46 (employing similar arguments and evidence to find plaintiff's case on inadequate training lacking with respect to both inadequacy of training and causation).

[37] *Id.* ("In fact, plaintiff's counsel repeatedly advised the court that its experts did not offer testimony about the training which had been received by Sergeant Selvik and the other Bensenville officers.").

[38] This training might include that necessary for undercover work, buy-busts, etc.

to put at issue whether additional training would have avoided the accident.

3

For the same reasons, the plaintiffs' theory that this case falls within the "single incident exception" fails. Charged to administer a regime without *respondeat superior,* we necessarily have been wary of finding municipal liability on the basis of this exception for a failure to train claim.[39] The evidence must establish culpability and causation within the exacting requirements of the Supreme Court's decisions.[40] In the only case in this circuit to apply the single incident exception to a failure to train claim, *Bryan County,* we stressed the requirements of notice and causation.[41] Assuming arguendo that the plaintiffs have raised a fact issue with respect to whether or not GTF officers were performing specialized narcotics operations, the void in the record remains: the summary judgment record sheds no light on any lack of training in the application of the rules of search and seizure or any evidence of a causal relationship between a lack of training and the death of Oregon.

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[39] *Cozzo v. Tangipahoa Parish Council – President Gov't,* 279 F.3d 273, 288 (5th Cir. 2002) (noting that this court has frequently rejected application of the single incident exception). *Cf. Bryan County,* 219 F.3d at 460 (finding single incident exception applicable where county had failed to provide any training to a deputy).

[40] *Id.* at 461.

[41] *Id.* at 461 n. 11 (distinguishing *Snyder* on the grounds that the holding of that case rested on policymakers lacking notice and the absence of a causal link).

The plaintiffs' single incident argument proves too much, as it essentially requires, again, that any Fourth Amendment violation be sufficient to satisfy the exception.

III

Finally, the plaintiffs appeal the dismissal of supplemental state law claims for wrongful death under the Texas Wrongful Death Act[42] and the Texas Tort Claims Act.[43] They argue that these state law claims were considered *sua sponte* by the district court and that summary judgment was improper because they were not given the opportunity to present their case. A district court is "empowered to enter summary judgment *sua sponte*"[44] provided that "the losing party has ten days notice to come forward with all of its evidence in opposition to summary judgment."[45] The record did not disclose the requisite notice to the plaintiffs that the district court was considering granting summary judgment on these state claims. Relatedly, with the focus of the parties elsewhere, the state law claims go untreated in its thoughtful opinion.

The City advances two arguments in support of the district court's grant of summary judgment on the plaintiffs' "state claims." First, it claims that the TWDA does not create a separate cause of action and is merely a

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[42] Tex. Civ. Prac. & Rem.Code § 71.001.

[43] Tex. Civ. Prac. & Rem.Code § 101.021.

[44] *Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 923 (5th Cir. 2001).

[45] *Love v. National Medical Enterprises*, 230 F.3d 765, 770-71 (5th Cir. 2000).

mechanism for granting a remedy for a violation of § 1983 where there would otherwise be no such violation. Second, it argues that the plaintiffs have not pled the requisite waiver of sovereign immunity under the TTCA.[46] The plaintiffs claim that their alternative theory of negligence on the part of the officers, while not pled with great detail, should have been the subject of a motion to for [sic] a more particular pleading, and at the very least not subject to a grant of summary judgment *sua sponte*. The City's first argument fails to accommodate *Rhyne v. Henderson County*,[47] where we affirmed a district court's dismissal without prejudice of a plaintiff's supplemental state claims in analogous circumstances.[48] We leave to the Texas courts the question of the sufficiency of the plaintiffs' pleading.

IV

Plaintiffs were unable to create a genuine issue of material fact with respect to their § 1983 claims, and therefore we AFFIRM the district court's grant of summary judgment. Given the present posture of the case the best course is to dismiss the supplemental state claims. We therefore VACATE the grant of summary judgment to the City on all state claims and MODIFY the district

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[46] *See* Red Brief at 55-57.

[47] 973 F.2d 386 (5th Cir. 1992).

[48] *Id.* at 395.

court's order by dismissing those claims without prejudice.[49]

AFFIRMED in part, MODIFIED in part.

[49] The City notes that the plaintiffs have not briefed this issue with respect to the survival claim brought by Susan Oregon Pineda as representative of the Estate of Pedro Oregon. The district court noted that it was unclear whether or not the Estate had asserted a wrongful death claim against the City. *Pineda,* 124 F.Supp.2d at 1090 n. 125. The plaintiffs' briefs refer only to wrongful death claims, and not to survival claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLAUDIA NAVARRO PINEDA, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-98-3877
CITY OF HOUSTON, et al.,	§	
Defendants.	§	

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Defendants.	§	

OPINION AND ORDER

Pending before the court is the City of Houston's Motion for Summary Judgment (Docket Entry No. 180). The City argues that it is entitled to summary judgment on the claims plaintiffs have brought pursuant to 42 U.S.C. § 1983 [1] and § 1988. For the reasons set forth below the City's motion will be granted.

[1] City of Houston's Motion for Summary Judgment at p. 1 (Docket Entry No. 180).

I. Background

A. Factual

Until the early 1990s responsibility for narcotics enforcement in the Houston Police Department (HPD) resided primarily with the local patrol divisions whose tactical units conducted undercover narcotics investigations. In 1992 Sam Nuchia became HPD Chief.[2] Nuchia ordered the tactical units to remain in uniform and to stop conducting undercover narcotics investigations, which were consolidated in a specialized Narcotics Division.[3]

In high crime areas Nuchia implemented "zero tolerance," a strategy in which communities are saturated by uniformed officers who enforce every law without regard to the magnitude of the offense.[4] Nuchia approved use of zero tolerance in the Gulfton area to combat street-level narcotics dealing.[5] Nuchia also created the Gang Task Force (GTF), an overtime program dedicated to suppressing gang activity through high visibility and aggressive enforcement of all laws.[6] The GTF is composed of uniformed patrol officers assigned to regular patrol shifts who

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[2] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 3 (Docket Entry No. 195). See also Deposition of former HPD Chief Sam Nuchia at p. 68 attached in Vol. II of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[3] *Id.* at pp. 3-4. See also Deposition of HPD Chief Clarence Bradford at pp. 172-176; and Nuchia Deposition at pp. 69-72 attached in Vol. II of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[4] *Id.* at p. 4. See also Nuchia Deposition at pp. 49-64, 71-72.

[5] *Id.* at pp. 4 and 11. See also Nuchia Deposition at pp. 75-76.

[6] *Id.* at p. 4. See also Nuchia Deposition at pp. 30-32.

also work overtime shifts with the GTF.[7] In the Gulfton area, the Southwest GTF was ordered to suppress gang activity using the zero-tolerance strategy.[8]

On the night of July 11, 1998, two officers assigned to the Southwest GTF, P.A. Herrada and J.R. Willis, stopped a car for traffic violations. Herrada and Willis arrested a passenger, Ryan Baxter, for public intoxication and for giving alcohol to a minor. When Baxter offered to provide information about a crack cocaine dealer, Herrada and Willis contacted other members of their unit. Together with officers D.R. Barrera, D.R. Perkins, L.E. Tillery, and the GTF supervisor, Sergeant D.H. Strouse, Herrada and Willis went with Baxter to the apartment occupied by Rogelio Oregon Navarro, Salvador Lopez, Nelly Mejia, and Pedro Oregon Navarro. While Baxter knocked on the door, the officers waited in a column at the foot of the stairs. Once the door opened, the officers entered the apartment without a warrant and without consent from the occupants. Following the entry, Navarro was shot dead and the three other occupants of the apartment were arrested. A subsequent search of the apartment failed to find drugs, but did find a handgun close to Navarro's body.

B. Procedural

On November 17, 1998, Pedro Oregon Navarro's mother – Claudia Navarro Pineda, his sister – Susana Oregon Navarro, who has been appointed administratrix of his estate, and the mothers of his two children – Ana

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[7] *Id.* See also Nuchia Deposition at pp. 31-32.

[8] *Id.* at p. 5. See also Nuchia Deposition at p. 49.

Isabel Lores as next friend of Ashley Oregon-Lores and Blanca Lidia Viera as next friend of Belinda Marili Viera filed this action together with the surviving occupants of the apartment, Rogelio Oregon Navarro, Salvador Lopez, and Nelly Mejia, against the City of Houston and HPD officers Herrada, Willis, Barrera, Perkins, Tillery, and Strouse pursuant to 42 U.S.C. § 1983 and the Texas Wrongful Death Statute, Texas Civil Practice and Remedies Code §§ 71.001 *et seq.* Plaintiffs alleged that without a warrant or probable cause the officers forcibly entered the apartment occupied by Pedro Oregon Navarro, Rogelio Oregon Navarro, Salvador Lopez, and Nelly Mejia and used excessive force to seize the occupants of the apartment in violation of rights guaranteed by the Fourth and Fourteenth Amendments. Specifically, plaintiffs alleged that when Rogelio Oregon Navarro opened the door to the apartment from the inside, the defendant officers rushed in without a search warrant and without stopping to request consent. Plaintiffs alleged that once inside, the officers threatened, assaulted, and falsely arrested Rogelio Oregon Navarro, Salvador Lopez, and Nelly Mejia, and shot and killed Pedro Oregon Navarro. Plaintiffs alleged that the officers' wrongful acts were conducted pursuant to official policies or customs of the City.

On April 7, 1999, Barrera, Herrada, Tillery, and Willis filed a motion for partial summary judgment on claims arising from the death of Pedro Oregon Navarro based on qualified immunity (Docket Entry No. 46). On April 8, 1999, Barrera, Herrada, Tillery, and Willis filed a motion to dismiss the § 1983 claims asserted by Rogelio Oregon Navarro, Salvador Lopez, and Nelly Mejia based on qualified immunity (Docket Entry No. 47); Strouse filed a motion to dismiss (Docket Entry No. 48) and a motion for

summary judgment (Docket Entry No. 50); and Perkins filed a motion for summary judgment (Docket Entry No. 49). In an Opinion and Order entered on July 29, 1999 (Docket Entry No. 72), the court granted in part and denied in part the officers' motions and ordered plaintiffs to file a second amended complaint. In the court's Opinion and Order of July 29, 1999, the motion for partial summary judgment on plaintiffs' claims for wrongful death and excessive use of force against Pedro Oregon Navarro was granted as to Tillery and Willis and denied as to Barrera and Herrada; the motion of Barrera, Herrada, Tillery, and Willis to dismiss plaintiffs' § 1983 claims was denied as to plaintiffs' claims against all four officers for the wrongful entry and search of Rogelio Oregon Navarro's apartment; denied as to plaintiffs' claims against Herrada for the false arrests of Salvador Lopez, Rogelio Oregon Navarro, and Nelly Mejia; denied as to plaintiffs' claims against Willis for the false arrests of Salvador Lopez and Rogelio Oregon Navarro and excessive use of force against Rogelio Oregon Navarro; denied as to plaintiffs' claims against Barrera for the false arrest of Nelly Mejia; granted as to plaintiffs' claims against Herrada for excessive use of force against Salvador Lopez, Rogelio Oregon Navarro, and Nelly Mejia; granted as to plaintiffs' claims against Willis for the false arrest of Nelly Mejia and excessive use of force against Salvador Lopez and Nelly Mejia; granted as to plaintiffs' claims against Barrera for the false arrests of Salvador Lopez and Rogelio Oregon Navarro and excessive use of force against Salvador Lopez, Rogelio Oregon Navarro, and Nelly Mejia; and granted as to plaintiffs' claims against Tillery for false arrests and excessive use of force against Salvador Lopez, Rogelio Oregon Navarro, and Nelly Mejia. Perkins' motion for summary judgment was denied as to plaintiffs' claims for the warrantless

entry and search of Rogelio Oregon Navarro's apartment and the false arrests of Salvador Lopez and Nelly Mejia; granted as to plaintiffs' claims for the false arrest of Rogelio Oregon Navarro and excessive use of force against Salvador Lopez, Rogelio Oregon Navarro, Nelly Mejia, and Pedro Oregon Navarro; and granted as to plaintiffs' claims for the wrongful death of Pedro Oregon Navarro. Strouse's motion to dismiss was denied as to plaintiffs' claims for the wrongful entry and search of Rogelio Oregon Navarro's apartment and the false arrest of Nelly Mejia; granted as to plaintiffs' claims for the false arrests of Salvador Lopez and Rogelio Oregon Navarro and for excessive use of force against Salvador Lopez, Rogelio Oregon Navarro, Nelly Mejia, and Pedro Oregon Navarro; and granted as to plaintiffs' claims for the wrongful death of Pedro Oregon Navarro. Strouse's motion for summary judgment was denied.[9]

On August 9, 1999, plaintiffs filed their Second Amended Complaint (Docket Entry No. 76). On August 23, 1999, the City of Houston filed crossclaims against the officers (Docket Entry No. 84), and the officers filed crossclaims against the City (Docket Entry No. 85).

On August 24, 1999, defendants Barrera, Herrada, and Willis filed their Notice of Interlocutory Appeal of the court's partial denial of their dispositive motions (Docket Entry No. 86). On August 27, 1999, Strouse filed his Notice of Interlocutory Appeal of the court's partial denial

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[9] The claims asserted against the officers that survived the court's Opinion and Order of July 29, 1999, are shown in Table 1.

[Table Omitted In Printing]

of his dispositive motions (Docket Entry No. 92). By Order entered on March 16, 2000, the Fifth Circuit dismissed Strouse's appeal (Docket Entry No. 159); and by Order entered on March 21, 2000, the Fifth Circuit dismissed Willis's appeal (Docket Entry No. 160). The appeals filed by Barrera and Herrada are pending before the Fifth Circuit.

On October 13, 1999, plaintiffs Rogelio Oregon Navarro, Salvador Lopez, and Nelly Mejia filed a Motion for Voluntary Dismissal Without Prejudice (Docket Entry No. 120). At a hearing held on October 27, 1999, the court granted the Motion for Voluntary Dismissal Without Prejudice and dismissed all claims brought by Rogelio Oregon Navarro, Salvador Lopez, and Nelly Mejia (Docket Entry No. 127). On August 4, 2000, the City filed motions for summary judgment on the claims that plaintiffs have brought pursuant to 42 U.S.C. § 1983 and § 1988 (Docket Entry No. 180) and on the claims asserted by the officers (Docket Entry No. 181). By Order entered on September 29, 2000, the court denied the City's motion for summary judgment on the crossclaims alleged by the officers (Docket Entry No. 201).

Pending before the court is the City of Houston's Motion for Summary Judgment (Docket Entry No. 180) in which the City seeks summary judgment on the claims that plaintiffs have brought for violation of the civil rights of Pedro Oregon Navarro pursuant to 42 U.S.C. § 1983 and § 1988.[10] The City argues that it is entitled to summary

[10] City of Houston's Motion for Summary Judgment at p. 2 (Docket Entry No. 180).

judgment on these claims "because the undisputed evidence shows that as a matter of law, the City of Houston does not have a custom, policy, or practice which was the moving force behind the alleged violation of the rights of Pedro Oregon Navarro."[11]

II. Summary Judgment Standard

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and the law entitles it to judgment. Fed. R. Civ. P. 56(c). Facts are considered "material" if they "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505, 2510 (1986). A material fact creates a "genuine issue" if the evidence is such that the trier of fact reasonably could resolve the factual dispute in favor of either party. *Id.* at 2511. The Supreme Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2552 (1986). A party moving for summary judgment bears the initial burden of identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Id.*

If the party moving for summary judgment meets the initial burden, Rule 56(c) requires the nonmovant to go

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[11] *Id.*

beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports that party's claim. *See Forsyth v. Barr,* 19 F.3d 1527, 1537 (5th Cir.), *cert. denied,* 115 S.Ct. 195 (1994). Unsupported allegations or affidavit or deposition testimony asserting ultimate or conclusory facts and conclusions of law are not sufficient to defeat a motion for summary judgment. *Clark v. America's Favorite Chicken Co.,* 110 F.3d 295, 297 (5th Cir. 1997). *See also Anderson,* 106 S.Ct. at 2509-2510. Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little,* 37 F.3d at 1075. "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Ragas v. Tennessee Gas Pipeline Co.,* 136 F.3d 455, 458 (5th Cir. 1998). Unless there is sufficient evidence for a jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial. *Anderson,* 106 S.Ct. at 2511.

III. Legal Standard

42 U.S.C. § 1983 provides a private right of action against "[e]very person" acting under color of state law who imposes or causes to be imposed a deprivation of constitutional rights. *Owen v. City of Independence, Missouri,* 100 S.Ct. 1398, 1423 (1980). *See also Monell v.*

Department of Social Services of City of New York, 98 S.Ct. 2018, 2035-2036 (1978). To establish a § 1983 claim against the City, plaintiffs must identify "(1) a policy (2) of the city's policymaker (3) that caused (4) the plaintiff[s] to be subjected to a deprivation of [a] constitutional right." *Grandstaff v. City of Borger, Tex.,* 767 F.2d 161, 168 (5th Cir. 1985), *cert. denied,* 107 S.Ct. 1369 (1987), *citing Monell,* 98 S.Ct. at 2036-2037. *See also Brown v. Bryan County, Ok.,* 219 F.3d 450, 457 (5th Cir. 2000).

A. Policy

> That the legal meaning of the term "policy" encompasses a range of municipal behavior can be found in *Monell.* "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible."

Brown, 219 F.3d at 457 n.9, *quoting Monell,* 98 S.Ct. at 2036-2037. Official policy, for purposes of § 1983 liability, is "[a] policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority." *Id.* at p. 457, *quoting Bennett v. City of Slidell,* 735 F.2d 861, 862 (5th Cir. 1984) (en banc), *cert. denied,* 105 S.Ct. 3476 (1985). Official policy can also be "[a] persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Id., quoting Bennett,* 735 F.2d at 862. *See also Webster v. City*

of Houston, 735 F.2d 838, 841 (5th Cir.) (en banc) (adopting definition of "official policy"), *modified on other grounds on reh'g,* 739 F.2d 993 (5th Cir. 1984) (en banc).

B. Of City's Policymaker

A city cannot be held vicariously liable under § 1983 for the constitutional torts of its employees or agents. *See Monell,* 98 S.Ct. at 2036-2037. *See also Baker v. Putnal,* 75 F.3d 190, 200 (5th Cir. 1996). Instead,

> [t]he 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts "of the municipality" – that is, acts which the municipality has officially sanctioned or ordered.

Pembaur v. City of Cincinnati, 106 S.Ct. 1292, 1298 (1986). "A policy or custom becomes official for purposes of § 1983 when it results from the decision or acquiescence of the municipal officer or body with 'final policymaking authority' over the subject matter of the offending policy." *Gros v. City of Grand Prairie, Tex.,* 181 F.3d 613, 615 (5th Cir. 1999).

C. Causation

Liability cannot be imposed on a municipality unless deliberate action attributable to the municipality itself is the "moving force" behind the deprivation of the plaintiff's federal rights. *Board of County Com'rs of Bryan County,*

Okla. v. Brown, 117 S.Ct. 1382, 1386 (1997), *quoting Monell,* 98 S.Ct. at 2027. *See also Spiller v. City of Texas City Police Dept.,* 130 F.3d 162, 167 (5th Cir. 1997) (official policy or custom must have been "a cause in fact of the deprivation of rights inflicted"). To satisfy the moving force requirement, plaintiffs must establish either that the custom or policy was the cause in fact of the constitutional violation or that the constitutional violation resulted from the execution of the official policy or custom. *Spiller,* 130 F.3d at 167, *quoting Meadowbriar Home For Children, Inc. v. Gunn,* 81 F.3d 521, 533 (5th Cir. 1996), and *Fraire v. City of Arlington,* 957 F.2d 1268, 1277 (5th Cir.), *cert. denied,* 113 S.Ct. 462 (1992).

Plaintiffs "must [also] demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." *Bryan County,* 117 S.Ct. at 1390. " 'Deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* at 1391. *See also Conner v. Travis County,* 209 F.3d 794, 796 (5th Cir. 2000) ("Deliberate indifference is more than mere negligence."); *Snyder v. Trepagnier,* 142 F.3d 791, 796 (5th Cir. 1998) ("*Bryan County* underscores the need for *Monell* plaintiffs to establish both the causal link ('moving force') and the city's degree of culpability ('deliberate indifference' to federally protected rights)."). "These requirements must not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability.' " *Snyder,* 142 F.3d at 796, *quoting Bryan County,* 117 S.Ct. at 1394. *See Farmer v.*

Brennan, 114 S.Ct. 1970 (1994) (defining "deliberate indifference").

D. Deprivation of Constitutional Right

"Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights conferred elsewhere.'" *Albright v. Oliver,* 114 S.Ct. 807 (1994), *quoting Baker v. McCollan,* 99 S.Ct. 2689, 2694 n.3 (1979). Plaintiffs must therefore show that the acts complained of occurred under color of state law and that Pedro Oregon Navarro was deprived of a right guaranteed by the Constitution or laws of the United States. *See Parratt v. Taylor,* 101 S.Ct. 1908, 1913 (1981), *overruled on other grounds, Daniels v. Williams,* 106 S.Ct. 662, (1986). *See also Piotrowski v. City of Houston,* 51 F.3d 512, 515 (5th Cir. 1995).

IV. Plaintiffs' Arguments

Plaintiffs argue that the actions of the Houston police officers who entered the Navarro apartment resulted from the following official policies or customs of HPD:

(1) allowing gang task forces to conduct unconstitutional searches of private residences in violation of the Fourth Amendment;

(2) providing inadequate training and supervision to the gang task forces; [and]

(3) directing the gang task forces to conduct law enforcement activities in a racially discriminatory manner.[12]

The City argues that it is entitled to summary judgment because the City does not have a custom, policy, or practice that was the moving force of a violation of Pedro Oregon Navarro's civil rights. Plaintiffs argue that the court should deny the City's motion because the summary judgment record raises genuine questions of material fact.

A. Allowing GTFs to Conduct Unconstitutional Searches of Private Residences in Violation of the Fourth Amendment

Plaintiffs allege that HPD maintained an unwritten policy of allowing its GTF officers to conduct unconstitutional searches of private residences in support of its zero-tolerance strategy and that the execution of this policy caused the warrantless entry and search of the Navarro apartment and the shooting death of Pedro Oregon Navarro in violation of the Fourth Amendment.[13]

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[12] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 1 (Docket Entry No. 195). Although plaintiffs' First Amended Complaint also asserted claims for inadequate recruitment and economic discrimination, "[a]fter conducting extensive discovery and reviewing the legal bases for their claims, Plaintiffs have concluded the evidence will not support claims for inadequate recruitment or economic discrimination, and they are abandoning those claims." Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 2 (Docket Entry No. 195).

[13] *Id.* at p. 22.

1. Policy Based on Pattern of Misconduct

Plaintiffs argue that their experts "have identified several warrantless residence searches that represent a pattern of constitutional violations."[14] The City argues that plaintiffs cannot show that it had an unwritten policy of allowing GTF officers to conduct unconstitutional searches of private residences.[15]

(a) Plaintiffs' Evidence

As evidence that HPD has an unwritten policy allowing unconstitutional searches of private residences, plaintiffs submit the affidavit testimony of expert witnesses, Thomas A. Parker and James Fyfe, 73 HPD offense reports, and a statement made by officer Barrera following the Pedro Oregon Navarro shooting.

(i) Expert Witness Testimony

Parker testified that the City produced approximately 5,000 offense reports.[16] Parker testified that when he asked plaintiffs' lawyers to cull from the 5,000 offense reports those involving narcotics and searches and

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[14] *Id.* at p. 24.

[15] City of Houston's Motion for Summary Judgment at p. 37 (Docket Entry No. 180).

[16] Parker Affidavit at p. 32. Although Parker refers to these reports as "Current Information Reports," two of the three "Current Information Reports" that he summarized at pages 29-32 of his affidavit include incident numbers that coincide with offense reports summarized by Fyfe and attached as Exhibits 7 and 19 in Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

seizures conducted by members of the Southwest GTF,[17] he received approximately 493 reports spanning the period from November 6, 1993, to December 29, 1999.[18] Parker testified that approximately 428 of these offense reports "involved narcotics investigations of one form or another."[19] Among these, approximately 237 investigations involved automobiles, . . . approximately 224 investigations involved pedestrians, . . . and approximately 33 investigations involved residences or other occupied dwellings such as motels.[20] When he narrowed his review

> to a one year period immediately preceding the Pedro Oregon shooting . . . [Parker] found that there were approximately 14 incidents of GTF members making warrantless investigative intrusions into residential premises pursuant to narcotics investigations – approximately one such intrusion every four weeks.[21]

From his review of these 14 offense reports Parker concluded that

> [t]he warrantless investigative intrusions into private residences, even though relatively small in number, were so egregious and outside the training and responsibilities of the GTF officers, that they should have been clear warnings to the Houston Police Department supervisory and

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[17] *Id.*

[18] *Id.*

[19] *Id.* at p. 33.

[20] *Id.*

[21] *Id.* at pp. 33-34.

> management staff that a significant problem existed in GTF tactics.[22]

Like Parker, Fyfe reviewed close to 500 incident reports from which he concluded that "[t]he data . . . disclose a pattern in which Southwest Gang Task Force officers have conducted what are clearly narcotics investigations involving apparently improper entries into private homes, apartments, or motel rooms . . . . "[23] Fyfe supported his conclusion by summarizing 17 incidents referenced by Bates Number.[24]

(ii) Offense Reports

Plaintiffs submit 73 offense reports ranging in date from March 18, 1994, to December 10, 1999.[25] Although plaintiffs' expert witnesses testify that they each reviewed close to 500 offense reports, plaintiffs fail to discuss the

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[22] *Id.* at p. 36.

[23] Fyfe Affidavit at pp. 22 and 26.

[24] *Id.* at pp. 27-30. Although Parker and Fyfe reference numerous incidents involving GTF officers, which they conclude represent frequent acts of police misconduct, with the exception of these seventeen incidents summarized by Fyfe and three incidents summarized by Parker, neither Parker nor Fyfe identify the specific sources from which their conclusions are drawn. Parker and Fyfe's failure to specifically identify their sources precludes the court from testing their conclusions against the offense reports attached in Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195). Two of the three incidents summarized by Parker are also summarized by Fyfe, and the third incident involved the search of a motor vehicle instead of a private residence. See Parker Affidavit at pp. 29-32.

[25] Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

offense reports individually and instead generally reference 6 of the 73 offense reports included in the summary judgment record in support of their experts' testimony.[26] Plaintiffs assert that these six offense reports establish that "[t]he pattern [of constitutional violations] became especially evident in the months leading up to the Oregon shooting, when there was a marked escalation in the number of warrantless residential searches."[27]

(iii) Officer Barrera's Statement

After the Pedro Oregon Navarro shooting officer Barrera executed a written statement in response to a complaint filed by HPD Chief Clarence Bradford.[28] In it Barrera stated that "[o]n a prior occasion, myself and several other officers of the Gang Task Force had entered other residences looking for drugs."[29] Plaintiffs argue that officer Barrera's statement confirms the existence of a pattern of warrantless searches that was "entrenched – and accelerating."[30]

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[26] See Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 24 (Docket Entry No. 195) referencing Exhibits 3-8 attached in Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[27] *Id.*

[28] Administrative Statement of D.R. Barrera, Document 26 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[29] *Id.* at pp. H000287-000288.

[30] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 25 (Docket Entry No. 195).

(b) The City's Evidence

The City argues that plaintiffs' evidence fails to establish that HPD has an unwritten policy allowing unconstitutional searches of private residences because "several of the cited reports are duplicates of the same incident,"[31] the incidents cited by plaintiffs "are generally in accordance with the Fourth Amendment,"[32] and that "even if the incidents cited were in violation of the Fourth Amendment, [their] small number is statistically insignificant."[33] In support of this argument the City asserts that

> [t]he Fourth Amendment does not impose a complete ban of warrantless searches, rather it limits the use of warrantless searches to those situations in which an officer has probable cause to conduct the search or situations in which exigent circumstances exist or consent is granted.[34]

The City argues that plaintiffs' offense reports evidence several instances in which GTF officers justifiably entered a residence without a warrant after smelling narcotics,[35] that the home entries involved misdemeanor charges,[36] and that "these relatively minor incidents do not bring the

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[31] City of Houston's Motion for Summary Judgment at p. 12 (Docket Entry No. 180).

[32] *Id.* at p. 28.

[33] *Id.* at p. 29.

[34] City of Houston's Reply to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 6 (Docket Entry No. 203).

[35] City of Houston's Motion for Summary Judgment at p. 28 (Docket Entry No. 180).

[36] *Id.* at p. 29.

case to the level of scienter required to make a municipality liable under § 1983."[37]

(c) Analysis

Warrantless searches inside a home are *per se* unreasonable, and therefore, unconstitutional, unless they fall into one of a few specifically established exceptions to the general rule. *Payton v. New York,* 100 S.Ct. 1371, 1382 (1980); *Coolidge v. New Hampshire,* 91 S.Ct. 2022, 2042-2043 (1971); *Schneckloth v. Bustamonte,* 93 S.Ct. 2041, 2043 (1973). *See also United States v. Munoz-Guerra,* 788 F.2d 295 (5th Cir. 1986). Consent and exigent circumstances are two well-settled exceptions to the Fourth Amendment's warrant requirement. *See United States v. Vega,* 221 F.3d 789, 798 (5th Cir. 2000), *citing Steagald v. United States,* 101 S.Ct. 1642 (1981).

Although Parker refers to 33 incidents involving warrantless entries into private residences, and Fyfe summarizes 17 incidents involving warrantless entries into private residences, neither Parker nor Fyfe attached copies of the relevant offense reports to their affidavits, and neither discusses the reasons – other than the fact that the entries were warrantless – why the offense reports are evidence of police misconduct that violates the Fourth Amendment. In response the City argues that the offense reports relied upon by Parker and Fyfe overlap and include several incidents in which GTF officers justifiably entered a residence without a warrant pursuant either to consent or exigent circumstances. However, like Parker

[37] *Id.* at p. 12.

and Fyfe, the City fails to discuss which offense reports overlap or which offense reports evidence police conduct that complies with the Fourth Amendment.

Using the Bates numbers referenced in Fyfe's affidavit, the court has prepared Table 2, which lists each of the warrantless entries of private residences summarized by Fyfe that is also represented by an offense report included in the summary judgment record. Table 2 identifies 13 incidents by Bates number, incident number, date, exhibit number in Vol. III of plaintiffs' exhibits, and description. The descriptions include how the incident began, the time it occurred, how it developed, and the arrests involved. Table 2 also identifies the exception to the warrant requirement on which the officers apparently relied to effect the entry and the officers' names. The court's review of these 13 offense reports reveals five entries based on consent, seven entries based on exigent circumstances, and one entry in which no Fourth Amendment interest appears to have been at issue.

Bates No.	Incident No.	Date	Ex. No.	Incident					Officers
				Start	Time	Description	No. Ar.	Exception	
72977	133192597	10-18-97	2	inv. stop	21:25 21:30	arrest urinating male, info. re drug party, smell dope thru door, evacuate apt, enter	8	exigent smell	Breedlove McDowell
74259	007160398	1-16-98	3	tip	00:48 01:25	drug tip, monitor area, knock on door, smell mj & cocaine, open door for officer safety, consent	1	consent	Harbison Crank
74949	024604298	2-25-98	4	call	23:20 02:51	loud noise & drug sales in apt, approach, chase suspect into apt, plain view cocaine, arrest	1	exigent pursuit	Harbison Crank
74972	024623498	2-26-98	5	call	00:30 ?	loud noise, find non-residents in apt, trespass arrest, wake and search sleeper find cocaine	1	no 4th Amend. Interest	Harbison Herrada Crank
26465	032203898	3-15-98	6	call	01:45 02:39	drug-related disturbance, apt manager directs to apt, consent, crack in back room	3	consent	Harbison
31760	038151198	3-28-98	7	tr. stop	01:05 04:15	GTF make PI arrest, go to apt where arrestee bought crack, smell mj, enter apt	3	exigent smell	Barrera Esquivel Willis Strouse
76978	067126598	5-28-98	8	walk thru	21:15 23:57	juvenile seen, officer approached open door, smell mj, consent search of apt	1	consent	Barrera Tillery
80297	029620499	3-6-99	9	call	18:12 23:42	males smoking mj in car, 1 susp runs into house, officer enters, plain view mj in car	2	exigent pursuit	Marcus
69851	055513597	5-2-97	12	inv. stop	00:15 03:11	nervous pedestrian, smell mj, go to apt to check ID, smell mj, enter, mj and cocaine	1	exigent smell	McDowell Breedlove
75881	041429198	4-3-98	13	walk thru	22:40 02:42	smell mj, PI arrest on balcony, plain view crack pipe through apt	2	exigent pl.view	Harbison Hernandez
72110	033462495	3-26-95	15	tip	00:08 01:45	CI tells GTF stolen guns hidden in house, call DA, get landlady's consent, arrest tenant	1	consent	Siewart Esquivel
28926	135436997	10-24-97	18	?	?	car theft suspect gives up partner	1	consent	Esquivel Crank
32273	019298198	2-13-98	19	inv. stop	22:45 02:48	gang members drinking beer in parking lot, drop beer, run into apt, officers pursue into apt	3	exigent pursuit	Crank Herrada

Table 2

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(i) Consent Searches

Warrantless searches are not unreasonable under the Fourth Amendment if consent is given to conduct them. *Schneckloth,* 93 S.Ct. at 2047-2048; *United States v. Tompkins,* 130 F.3d 117, 121 (5th Cir. 1997), *cert. denied,* 118 S.Ct. 1335 (1998). When relying on the consensual search exception the government bears the burden of proving by a preponderance of the evidence that consent was given freely and voluntarily. *Bumper v. North Carolina,* 88 S.Ct. 1788, 1792 (1968). *See also United States v. Ponce,* 8 F.3d 989, 997 (5th Cir. 1993). The voluntariness of a search is a question of fact to be determined from the totality of the circumstances. *Ohio v. Robinette,* 117 S.Ct. 417, 421 (1996), *citing Schneckloth,* 93 S.Ct. at 2047. *See also Tompkins,* 130 F.3d at 121, and *United States v. Morales,* 171 F.3d 978, 981 (5th Cir. 1999). Relevant factors considered by courts in determining whether consent is given freely and voluntarily include:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

Tompkins, 130 F.3d at 121.

Five of the incidents listed in Table 2 describe searches apparently based on the consent exception to the

warrant requirement.[38] Although plaintiffs have submitted each of these five offense reports as evidence of unconstitutional police action, the City does not argue that the consent obtained in any of these five situations was given freely and voluntarily. Instead, the City simply asserts that consent searches are permitted by the Fourth Amendment.[39] Because the Supreme Court has long held that warrantless searches of private residences are presumptively unconstitutional and that the government bears the burden of demonstrating otherwise, because the City fails to present any summary judgment evidence demonstrating that the consents obtained to enter and search private residences evidenced by the five offense reports summarized by Fyfe were given freely and voluntarily, and because the court must resolve factual controversies in favor of the nonmovant, the court concludes that the searches described in these five offense reports are presumptively improper.

(ii) Searches Based on Probable Cause and Exigent Circumstances

Warrantless searches are not unreasonable under the Fourth Amendment if supported by probable cause and exigent circumstances. *Vega,* 221 F.3d at 798, *citing Steagald,* 101 S.Ct. at 1642. *See also Vale v. Louisiana,* 90

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[38] See Exhibits 3, 6, 8, 15, and 18 attached in Vol. III of the Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[39] City of Houston's Reply to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 6 (Docket Entry No. 203).

S.Ct. 1969 (1970). Exigent circumstances "include those in which officers reasonably fear for their safety, where firearms are present, or where there is a risk of a criminal suspect's escaping or fear of destruction of evidence." *United States v. Rico,* 51 F.3d 495, 500 (5th Cir.), *cert. denied,* 116 S.Ct. 220 (1995). When relying on the exigent circumstances exception the government bears the burden of proving by a preponderance of the evidence the existence of both probable cause and exigent circumstances. *Morales,* 171 F.3d at 981-982. *See also Coolidge,* 91 S.Ct. at 2042 ("a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show . . . the presence of 'exigent circumstances'"). In *Rico* the Fifth Circuit identified a non-exhaustive list of factors that may be considered in determining the existence of exigent circumstances, including

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) the reasonable belief that contraband is about to be removed; (3) the possibility of danger to the police officers guarding the site of contraband while a search warrant is sought; (4) information that the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in narcotics traffic.

51 F.3d at 501, *citing United States v. Richard,* 994 F.2d 244, 248 (5th Cir. 1993). *See also Vega,* 221 F.3d at 800; *Morales,* 171 F.3d at 982. In the Fifth Circuit "exigencies deliberately manufactured by the Government violate the Fourth Amendment, especially if the Government's actions are intentionally taken to avoid the warrant requirement."

United States v. Howard, 106 F.3d 70, 78-79 (5th Cir. 1997). To support warrantless entry of a residence, exigent circumstances must exist prior to the time the police approach a residence. *Vega,* 221 F.3d at 799-800.

Seven of the incidents listed in Table 2 describe searches apparently based on the exigent circumstances exception to the warrant requirement.[40] Three of these searches involved pursuit of fleeing suspects, three involved the smell of burning narcotics, and one involved the plain view of narcotics paraphernalia. Although plaintiffs have submitted each of these offense reports as evidence of unconstitutional police action, the City argues only that the smell of burning narcotics constitutes both the probable cause and exigent circumstances required to justify a warrantless entry and search of a private residence.[41] In support of this argument the City cites three Fifth Circuit cases: *United States v. McSween,* 53 F.3d 684, 686 (5th Cir.), *cert. denied,* 116 S.Ct. 199 (1995); *United States v. Reed,* 882 F.2d 147, 149 (5th Cir. 1989); *United States v. Villarreal,* 565 F.2d 932, 937 (5th Cir.), *cert. denied,* 99 S.Ct. 92 (1978), and one Eleventh Circuit case, *United States v. Tobin,* 923 F.2d 1506, 1510 (11th Cir.), *cert. denied,* 112 S.Ct. 299 (1991).[42] The City also asserts that in *United States v. Grissett,* 925 F.2d 776, 778 (4th Cir.), *cert. denied sub nom. Perez-Rodriguez v. United States,* 111

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[40] See Exhibits 2, 4, 7, 9, 12-13, and 19 attached in Vol. III of the Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[41] City of Houston's Motion for Summary Judgment at pp. 12 and 28 (Docket Entry No. 180).

[42] *Id.* at p. 28.

S.Ct. 2245 (1991), the Fourth Circuit held that an officer's smell of burning narcotics constitutes "both . . . probable cause *and* exigent circumstances" to enter and search a residence without a warrant.[43]

The Fifth Circuit cases the City cites in support of its argument that the smell of burning narcotics constitutes probable cause are inapposite because each of them involves the search of an automobile, not the search of a private residence. *See McSween,* 53 F.3d at 686; *Reed,* 882 F.2d at 149; *Villarreal,* 565 F.2d at 937. The Supreme Court has long held that due to an automobile's mobile nature police officers have greater discretion to perform warrantless searches of automobiles than residences. *See Chambers v. Maroney,* 90 S.Ct. 1975, 1981 (1970); *Carroll v. United States,* 45 S.Ct. 280, 285 (1925). *See also Chimel v. California,* 89 S.Ct. 2034 (1960) ("Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants 'where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.'"), *citing Carroll,* 45 S.Ct. at 285. The Eleventh Circuit case cited by the City did not base its finding of exigent circumstances on the smell of burning narcotics, but on the hurried actions and furtive looks of the defendants. *See Tobin,* 923 F.2d at 1511 (exigent circumstances present where "the agents could reasonably conclude from the defendants' hurried actions and furtive looks that [they] were either

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[43] *Id.*

aware or afraid that someone was watching them [and] [d]estruction or removal of . . . the narcotics was therefore a possibility"). The Fourth Circuit case cited by the City in support of its argument that the smell of burning narcotics constitutes both probable cause and exigent circumstances does not so hold. *See Grissett,* 925 F.2d at 778 (warrantless entry of hotel room justified both by the smell of burning marijuana and the exigent circumstances that developed after the officers identified themselves to the occupants of the hotel room which the officers had approached in order to identify a weapons offender).[44]

The City's arguments concerning an officer's ability to cite the smell of burning narcotics as justification for effecting a warrantless entry and search of a private residence are governed by two Supreme Court cases not

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[44] In *Grissett* police responded to a call informing them that there was an armed man in a motel lobby. Police arrived on the scene, located the man, and recovered the gun. The man could not produce identification, but he told the police officers that a friend in a motel room could identify him. Uniformed police officers knocked on the motel room door for the purpose of establishing the armed man's identity. Although they did not suspect the presence of drugs, the officers smelled marijuana while talking to the man at the motel room door. Fearing that the defendants would dispose of the drugs before officers could return with a warrant, the police entered and seized drugs that were in plain view. The Fourth Circuit determined that the entry was justified because the officers reasonably concluded that evidence would likely be destroyed before a warrant could be obtained, thereby giving rise to exigent circumstances. The facts of *Grissett* are distinguishable from those evidenced in the offense reports at issue in the present case because the officers in these cases had information that drugs were being used in the apartments at the time they approached the apartments. See Exhibits 2, 4, 7, 9, and 12-13 attached in Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

cited by the City: *Johnson v. United States,* 68 S.Ct. 367 (1948), and *Welsh v. Wisconsin,* 104 S.Ct. 2091 (1984). In *Johnson* police received a tip that opium was being used by unknown persons in a hotel room. 68 S.Ct. at 368. Arriving at the hotel to investigate, the police smelled the "distinctive and unmistakable" odor of burning opium coming from a certain room, knocked on the door, announced their presence, and asked for admittance. *Id.* A search of the room revealed opium and a smoking apparatus. *Id.* Reversing the occupant's conviction for possession of opium, the Court stated:

> At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant . . . . If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant . . .
>
> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure

> only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent. (citations omitted)

Id. The Supreme Court's ruling in *Johnson* establishes that an untested and uncorroborated tip coupled with the odor of burning narcotics does not by itself provide officers cause to enter and search a private residence without a warrant. *See also Taylor v. United States,* 52 S.Ct. 466 (1932) (odors alone do not authorize a search without a warrant).

In *Welsh v. Wisconsin* the Supreme Court held that the police violated the defendant's Fourth Amendment rights by arresting him in his home without a warrant for driving while intoxicated. The Supreme Court emphasized that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." 104 S.Ct. at 2097. The Court noted that only "hot pursuit of a fleeing felon," "destruction of evidence," and "ongoing fire" had been recognized by the Court as emergency situations justifying a warrantless search or arrest and that only the "hot pursuit" doctrine had been applied to warrantless arrests effected in a suspect's home. 104 S.Ct. at 2097-98. In language that

is particularly pertinent to the City's arguments, the *Welsh* Court stated:

> Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

104 S.Ct. at 2098 (citations omitted). The *Welsh* opinion explains the meaning of "minor offense" by reference to *Payton,* 100 S.Ct. at 1371, the case in which the Supreme Court prohibited warrantless arrests in the home without probable cause and exigent circumstances. *Id.* In *Payton* even the dissenters recognized the importance of limiting such arrests to felony offenses. *See* 100 S.Ct. at 1395 (White, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes.").[45]

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[45] In further amplification of the meaning of "minor offense" in this context, the *Welsh* opinion quotes with approval Justice Jackson's

(Continued on following page)

Because in *Johnson* the Supreme Court held that the smell of burning opium will not support a warrantless entry into a private residence, because in *Welsh* the Supreme Court held that warrantless entries into private residences cannot be made to effect arrests for minor offenses, and because many of the arrests made by GTF officers pursuant to home entries based on the smell of burning marijuana are – as the City admits – for misdemeanor offenses,[46] the court is not persuaded by the City's argument that the smell of burning narcotics establishes both the probable cause and the exigent circumstances needed to justify the warrantless entry and search of a private residence. Because the Supreme Court has long held that warrantless searches of private residences are presumptively unconstitutional and that the government bears the burden of demonstrating otherwise, because the

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concurring opinion in *McDonald v. United States*, 69 S.Ct. 191, 195-96 (1948), a case arising from a conviction for conducting an illegal numbers game:

> Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it. . . . It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. . . . When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant.

Welsh, 104 S.Ct. at 2098.

[46] See City of Houston's Motion for Summary Judgment at p. 29 (Docket Entry No. 180) where the City asserts that the warrantless home entries cited by the plaintiffs "all involv[e] misdemeanor charges."

City fails to present summary judgment evidence demonstrating that the entries and searches evidenced by the seven offense reports summarized by Fyfe which appear to have been based on the exigent circumstances exception to the warrant requirement were supported by both probable cause and exigent circumstances, and because the court must resolve factual controversies in favor of the nonmovant, the court concludes that the searches described in these seven offense reports are presumptively improper.[47]

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[47] While the court is aware that there are reported cases from other jurisdictions holding that the smell of burning marijuana establishes exigent circumstances because the smell is itself proof that evidence of criminal conduct is being destroyed, none of them cites *Johnson*, 68 S.Ct. at 367, or *Welsh*, 114 S.Ct. at 2091. *See State v. Decker*, 580 P.2d 333 (1978); *State v. Kosman*, 892 P.2d 207 (Ct. App. Ariz. 1995); *Mendez v. People*, 986 P.2d 275 (Colo. 1999), *cert. denied*, 120 S.Ct. 1680 (2000); *People v. Baker*, 813 P.2d 331 (Colo. 1991); *Joseph v. State*, 3 S.W.3d 627 (Tex. App. – Houston [14th Dist] 1999, no pet.). Cases from other jurisdictions which cite *Johnson* and *Welsh* hold that the smell of burning narcotics (marijuana) does not evidence an offense that is sufficiently grave to justify the entry and search of a private residence without a warrant. *See State v. Curl*, 869 P.2d 224 (Idaho 1993), *cert. denied*, 114 S.Ct. 1293 (1994); *Haley v. State*, 696 N.E.2d 98 (Ind. Ct. App. 1998); *State v. Beeken*, 585 N.W.2d 865, 872 (Neb. App. 1998); *State v. Wagoner*, 966 P.2d 176 (N.M. Ct. App.), *cert. denied*, 964 P.2d 818 (N.M. 1998); *State v. Ackerman*, 499 N.W.2d 882 (N.D. 1993); *State v. Robinson*, 659 N.E.2d 1292 (Ohio App. 1995); *State v. Steelman*, 16 S.W.3d 483 (Tex. App. – Eastland 2000, petition for discretionary review granted Sept. 27, 2000), *State v. Ramirez*, 746 P.2d 344 (Wash. App. 1987). Because the court concludes that *Johnson* and *Welsh* govern situations in which the smell of burning narcotics provide officers the only evidence that a crime is being committed, and because *Johnson* and *Welsh* were both decided long before the incidents documented in the offense reports submitted in opposition to the City's motion for summary judgment, the court is not persuaded by the City's assertion that the smell of burning narcotics constitutes both the probable cause

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(iii) Search Lacking A Fourth Amendment Interest

One of the incidents listed in Table 2 evidences an incident in which GTF officers responded to a loud noise complaint at an apartment and found the apartment occupied by trespassers.[48] Because trespassers have no expectation of privacy protected by the Fourth Amendment, the court is not persuaded that the warrantless entry and search of a private residence described in this offense report is presumptively improper. *See United States v. Garcilazo-Martinez,* 881 F.Supp. 265 (S.D. Tex. 1994) (no legitimate expectation of privacy in abandoned house); *United States v. McRae,* 156 F.3d 708, 711 (6th Cir. 1998) (no legitimate expectation of privacy in vacant house); *United States v. Dodds,* 946 F.2d 726 (10th Cir. 1991) (no legitimate expectation of privacy in abandoned apartment); *Rakas v. Illinois,* 99 S.Ct. 421, 430-431 n.12 (1978) (suggesting that wrongful presence on property supports no reasonable expectation of privacy).

(iv) Court's Conclusions

The court's review of the summary judgment evidence establishes that the plaintiffs have produced evidence of eleven incidents that occurred before the shooting of Pedro Oregon Navarro in which GTF officers entered and

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and the exigent circumstances needed to conduct a constitutionally sound warrantless entry and search of a private residence.

[48] Exhibit 5 attached in Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

searched private residences without a warrant in circumstances which, viewed in the light most favorable to plaintiffs, raise a presumption of unconstitutional police misconduct.[49] One of these incidents occurred in 1995,[50] three occurred in 1997,[51] and seven occurred in 1998 prior to the incident at the Navarro apartment.[52] The summary judgment evidence also shows that these eleven incidents resulted in 25 warrantless arrests. Because the warrantless entry of a private residence by police either to search or to arrest presumptively violates the Fourth Amendment, because the City fails to demonstrate that the entries, searches, and arrests evidenced by these eleven incidents are constitutionally sound, and because the court is not persuaded by the City's argument that the smell of burning narcotics provides officers both the probable cause and exigent circumstances needed to justify warrantless entry and search of a private residence, the court concludes that plaintiffs have raised a genuine issue of material fact concerning whether the warrantless entries and searches evidenced in the summary judgment

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[49] Exhibits 2-4, 6-8, 12-13, 15, 18, and 19 attached in Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[50] Exhibit 15 attached in Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[51] Exhibits 2, 12, and 18 attached in Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[52] Exhibits 3-4, 6-8, 13, and 19 attached in Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

record represent a persistent, widespread practice of GTF officers which is so common and well settled as to constitute a custom that fairly represents municipal policy.[53]

2. Known to City's Official Policymaker

A policy or custom becomes official for purposes of § 1983 when it results from the decision or acquiescence of the municipal officer or body with "final policymaking authority" over the subject matter of the offending policy. *Gros,* 181 F.3d at 615. Plaintiffs offer no evidence that City policymakers had actual knowledge that GTF officers were conducting warrantless and unconstitutional searches of private residences, much less that City policymakers approved this policy.[54] Instead, citing *Webster,* 735 F.2d at 841, plaintiffs argue that "[t]his pattern of warrantless searches rises to the level of an official policy or custom."[55] In support of this argument, plaintiffs argue that six incidents of warrantless entries and searches conducted by

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[53] The court's conclusion should not be read to mean that a reasonable municipal policymaker reading these offense reports would have known that GTF officers were engaging in a pattern of unconstitutional police misconduct or that plaintiffs' expert witnesses have correctly characterized the police conduct at issue as "improper" or "egregious."

[54] See Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 21 n. 3 (Docket Entry No. 195), where citing the dissent in *Bryan County,* 117 S.Ct. at 1401-1404, plaintiffs state that they "acknowledge that this Court is bound by the municipal liability rule of *Monell,* but they respectfully preserve a good-faith argument to change existing law and establish a rule of vicarious municipal liability."

[55] *Id.* at p. 25.

GTF officers in 1998 show that "the pattern [of constitutional violations] became especially evident in the months leading up to the Oregon shooting, when there was a marked escalation in the number of warrantless residential searches."[56] Plaintiffs also cite Parker, who testified that even a relatively small number of warrantless searches should place HPD on notice that the GTF was engaging in a pattern of unconstitutional conduct.[57] Finally, plaintiffs argue that

> [w]hen police conduct is especially egregious, as here, the burden of proof is less rigorous. "Where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of the conduct to be satisfied that diligent governing body members would necessarily have learned of the objectionable practice and acceded to its continuation." . . . Even a relatively small number of warrantless searches should place the HPD on notice that the GTF was engaging in a pattern of unconstitutional conduct.[58]

The Fifth Circuit has explained that in such cases,

> [c]onstructive knowledge may be attributed to the governing body on the ground that it would

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[56] *Id.* at p. 24, citing Exhibits 3-8 attached in Vol. III of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[57] *Id.* at p. 25, citing Parker Deposition at pp. 143-144, and Parker Affidavit at p. 36.

[58] *Id., quoting Bennett v. City of Slidell,* 728 F.2d 762, 768 (5th Cir.1984) (en banc), *reh'g denied,* 735 F.2d 861, 862 (5th Cir.1984) (en banc), *cert. denied,* 105 S.Ct. 3476 (1985), and citing Parker Affidavit at p. 36.

> have known of the violations if it had properly exercised its responsibilities, as for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity.

Webster, 735 F.2d at 841, *citing Bennett v. City of Slidell,* 728 F.2d 762, 768 (5th Cir. 1984) (en banc), *reh'g denied,* 735 F.2d 861, 862 (5th Cir. 1984) (en banc), *cert. denied,* 105 S.Ct. 3476 (1985). The City argues that the warrantless entries and searches of private residences cited by plaintiffs and their expert witnesses are too small in number and statistically insignificant to raise a genuine issue of material fact.[59]

There is no bright line rule for determining when a number of incidents taken together comprise a pattern of conduct serious enough to impute constructive knowledge to municipal policymakers. However, even assuming that the six 1998 incidents cited by plaintiffs evidence conduct that violated the Fourth Amendment, plaintiffs fail to show that these six warrantless entries and searches of private residences "were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity." *Bennett,* 728 F.2d at 768. Although plaintiffs present evidence that the responsibilities and procedures of the GTF were the subject of discussion within HPD,[60] and that the discussion included Kimbra

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[59] City of Houston's Motion for Summary Judgment at p. 29 (Docket Entry No. 180).

[60] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at pp. 31-33 (Docket Entry No. 195).

Ogg, Director of the Mayor's Anti-Gang Office,[61] plaintiffs present no evidence that before the incident on July 11-12, 1998, that gave rise to this action warrantless entries and searches of private residences conducted by GTF officers was ever a topic of discussion within the HPD, the mayor's office, or the city council. Moreover, plaintiffs present no evidence that HPD policymakers read the specific offense reports summarized in Table 2, or that if HPD policymakers had read them they would have known that any unconstitutional acts had occurred. Without some notice of prior incidents, City policymakers cannot reasonably be said to have shown deliberate indifference towards the GTF's misconduct.

Even though plaintiffs have presented evidence from which a reasonable trier of fact could conclude that the actions of certain GTF officers constituted a pattern of unconstitutional conduct, plaintiffs have failed to present evidence from which a reasonable trier of fact could conclude either that municipal policymakers knew about that pattern of unconstitutional misconduct or that the warrantless entries and searches were so numerous or flagrant that constructive knowledge of them should be imputed to municipal policymakers. *See Hamilton v. Rodgers,* 783 F.2d 1306, 1309 (5th Cir.), *opinion withdrawn on other grounds,* 791 F.2d 439 (5th Cir. 1986) (holding that a dozen incidents of racial discrimination within a two-and-a-half-year period did not constitute a continual pattern of conduct sufficient to warrant the imputation of constructive knowledge to high ranking

[61] *Id.* at pp. 32-33 and 36.

officers of the Houston Fire Department for purposes of imposing § 1983 liability). Accordingly, the court concludes that plaintiffs have failed to satisfy the second element necessary for a finding of municipal liability and that the City is entitled to summary judgment on plaintiffs' claim that the City maintained an unwritten policy of allowing GTF officers to conduct warrantless, unconstitutional searches of private residences.

B. Failure to Provide Adequate Training and Supervision to the GTFs

Plaintiffs allege that HPD provided inadequate training and supervision to its GTF officers, and that HPD's inadequate GTF training and supervision caused the warrantless entry and search of the Navarro apartment that resulted in the shooting death of Pedro Oregon Navarro in violation of the Due Process Clause of the Fourteenth Amendment.[62] Plaintiffs argue that the City's GTF training and supervision was inadequate because: (1) the City failed to provide GTF officers specialized narcotics training and written standard operating procedures and (2) the City failed to provide GTF officers adequate supervision.[63] The City argues that it is entitled to summary judgment on this issue because GTF training complies with and exceeds state-mandated training standards for

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[62] *Id.* at pp. 20-21 and 28.

[63] *Id.* at p. 28.

Texas peace officers, which plaintiffs do not challenge as inadequate.[64]

Municipal liability for the failure to train or supervise police officers arises only when "the failure to train [or supervise] amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton, Ohio v. Harris,* 109 S.Ct. 1197, 1204 (1989). To succeed on their failure to train and supervise claim, plaintiffs must show that

> (1) the training or . . . [supervising] procedures of the municipality's policymaker were inadequate, (2) the municipality's policymaker was deliberately indifferent in adopting the . . . training [or supervising] policy, and (3) the inadequate . . . training [or supervising] policy directly caused the plaintiffs' injury.

Conner v. Travis County, 209 F.3d 794, 796 (5th Cir. 2000), *quoting Baker v. Putnal,* 75 F.3d 190, 200 (5th Cir. 1996).

Plaintiffs may show that the training or supervising procedures of the City's policymaker were inadequate in two ways. First, plaintiffs can show that the City deliberately chose not to train or supervise its officers despite being on notice that its training and supervising regimen failed to prevent tortious conduct by its officers. *See Gabriel v. City of Plano,* 202 F.3d 741, 745 (5th Cir. 2000), *citing Bryan County,* 117 S.Ct. at 1388. Second, under the "single incident exception," a single violation of federal rights may be sufficient to prove deliberate indifference.

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[64] City of Houston's Motion for Summary Judgment at p. 22 (Docket Entry No. 180).

Id. The single incident exception requires proof that officers are placed in "recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different police training [or supervision]." *Id., citing Bryan County,* 117 S.Ct. at 1390. *See also City of Canton,* 109 S.Ct. at 1205 n.10 (notice may be implied where failure to train officers or employees is so likely to result in a violation of constitutional rights that the need for training is plainly obvious). To establish deliberate indifference on a failure to train claim, actual or constructive knowledge of the inadequacy of the training program must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. *Cf. Webster,* 735 F.2d at 841. *See also Languirand v. Hayden,* 717 F.2d 220, 225 (5th Cir. 1983), *cert. denied,* 104 S.Ct. 2656 (1984) (isolated instances of police misconduct are inadequate to prove knowledge and acquiescence).

1. Failure to Provide Specialized Narcotics Training and Standard Operating Procedures

Plaintiffs argue that the City failed to provide GTF officers specialized narcotics training and standard operating procedures defining the boundaries of their responsibilities. In support of this argument plaintiffs assert that the City had actual knowledge that GTF officers needed specialized narcotics training and standard operating procedures, that the City was aware of a pattern of misconduct that gave the City constructive notice that GTF officers needed specialized narcotics training and standard operating procedures, and that the City placed GTF officers in recurring situations that required specialized narcotics training and standard operating procedures.

(a) Actual Knowledge

A municipality's actual knowledge of tortious misconduct by police officers may be shown by means such as discussions at council meetings or receipt of written information by city policymakers. *Bennett,* 728 F.2d at 768. Chief Bradford testified that the Chief of Police and his command staff of assistant chiefs serve as policymakers for HPD.[65] As evidence that the City had actual knowledge of the inadequacy of its training program for GTF officers, plaintiffs cite Bradford's deposition testimony, an interoffice memorandum written by HPD Lieutenant R.W. Robertson on January 13, 1995, the deposition testimony of Kimbra Ogg, Director of the Mayor's Anti-Gang Office, and the affidavit testimony of their expert witnesses, Fyfe and Parker.

Bradford testified that GTF officers did not receive written guidelines defining the scope of their responsibilities.[66] Robertson's memorandum, which was addressed to a sergeant, a lieutenant, and two captains, discussed a review to be undertaken by the patrol assistance chiefs and captains concerning GTF officers' need for standard operating procedures.[67] Ogg testified that she was concerned that GTF officers were not receiving adequate

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[65] Bradford Deposition at pp. 18-19 and 32.

[66] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 30 (Docket Entry No. 195), citing Bradford Deposition at pp. 149-150.

[67] *Id.* at pp. 6 and 32, citing Interoffice Correspondence of R.W. Robertson, Document 11 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

instruction on how to legally perform their job,[68] and that she had discussed her concern with HPD command staff on at least two occasions in 1997 when she urged HPD to change its policy and provide additional training to GTF officers.[69] Fyfe and Parker testified that "written guidelines and standard operating procedures are an important component of any training program because they educate officers about the boundaries of their authority."[70]

The court is not persuaded that plaintiffs' evidence establishes that City policymakers had actual knowledge that GTF officers' training was inadequate. Plaintiffs' evidence does not show that the City was on notice that its training regimen failed to prevent tortious misconduct by its GTF officers or that GTF officers are placed in recurring situations that present an obvious potential for violation of constitutional rights absent specialized narcotics training and standard operating procedures. *See Gabriel,* 202 F.3d at 745, *citing Bryan County,* 117 S.Ct. at 1388-1390; and *City of Canton,* 109 S.Ct. at 1205 n.10.

While Bradford testified that GTF officers did not receive written guidelines, he also testified that

> [t]he gang task force officers are primarily a uniform police force with a special assignment. We expect the officers to do what their basic training as a police officer would enable them to do. They

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[68] *Id.* at p. 32, citing Deposition of Kembra Kathryn Ogg at p. 48 attached in Vol. II of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[69] *Id.* at p. 33, citing Ogg Deposition at p. 39.

[70] *Id.* at p. 30, citing Fyfe Affidavit at pp. 40-41 and Parker Affidavit at p. 8.

> do it in uniform services. They can enforce laws, including narcotics laws. We don't want them engaging in investigations. The objective was to increase the uniform presence of police officers on the streets of Houston, because we are getting complaints about gang activity on the streets of Houston. It was – it was to curtail criminal street gang activity. And a uniform officer being present, we know that it's less likely that gangs are going to involve themselves in activity with a uniformed police officer being present.[71]

Bradford also testified that

> every police officer is expected to enforce narcotics laws, particularly and especially in on-view situations. And many of the gang task officers were doing that and are – are doing that.[72]

Assistant Police Chief Joe L. Breshears testified that HPD has standard operating procedures for patrol officers, which GTF officers were expected to follow.[73] Like Bradford, plaintiffs describe GTF officers as "uniformed patrol officers assigned to regular patrol shifts who also worked overtime shifts with the GTF."[74] Plaintiffs make no showing that either the training or the standard operating procedures provided to patrol officers were inadequate for officers performing GTF duties. *See Canton,* 109 S.Ct. at

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[71] Bradford Deposition at pp. 149-150.

[72] *Id.* at p. 74.

[73] Deposition of Joe L. Breshears at p. 39 attached in Vol. II of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195)

[74] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 4 (Docket Entry No. 195).

1206 (when assessing a claim for failure to train, courts must focus on the adequacy of the training program in relation to the tasks the particular officers must perform).

Robertson wrote in his memorandum that

> the patrol assistance chiefs and captains have decided to review the need for Gang Task Force . . . S[tandard] O[perating] P[rocedures]. Currently, the general consent is that this issue needs to be addressed and S[tandard] O[perating] P[rocedures] developed. . . . Attached you will find preliminary surveys for the Gang Task Force. . . . The information contained within these initial surveys is very vague. One of the things that we are asking for, is a list of all tactics on initiatives your units are currently involved in or would like to [be] involved in at some later date.[75]

Among the information to be addressed in the survey were responses to questions about the need for specialized training, a training manual, and standardized investigation procedures.[76] Roberston's memorandum demonstrates that in January of 1995 HPD was in the process of determining what types of recurring situations GTF officers faced and whether those situations required specialized training. It does not evidence either that GTF officers were engaging in tortious misconduct or that they were placed in recurring situations that required either specialized

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[75] Interoffice Correspondence of R.W. Robertson, Document 11 at p. 024153 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[76] *Id.* at p. H024154.

narcotics training or standard operating procedures that differed from those issued for patrol officers.

Ogg's testimony that she notified HPD command staff about her concern that GTF officers were not adequately trained is conclusory, lacking details of either the duties the GTF officers were expected to perform, the training GTF officers received, or the specific individuals to whom she expressed her concerns. Ogg's testimony does not contain evidence either that GTF officers were engaging in tortious misconduct due to inadequate training or that they were placed in recurring situations for which they were inadequately trained.

Fyfe and Parker testified that "written guidelines and standard operating procedures are an important component of any training program because they educate officers about the boundaries of their authority."[77] The City does not dispute this statement, but like Bradford's testimony, Robertson's memorandum, and Ogg's testimony, this expert testimony does not evidence either that GTF officers were engaging in tortious misconduct due to inadequate training or that GTF officers were placed in recurring situations for which they were inadequately trained.

Plaintiffs argue that "the key issue" in determining whether the City had actual knowledge of the need to provide GTF officers specialized narcotics training and standard operating procedures is "whether the City knew

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[77] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 30 (Docket Entry No. 195), citing Fyfe Affidavit at pp. 40-41 and Parker Affidavit at p. 8.

that GTF officers were conducting narcotics investigations."[78] Because plaintiffs have presented no summary judgment evidence showing that City policymakers had actual knowledge that GTF officers were expected to conduct narcotics investigations for which they needed specialized training or standard operating procedures that differed from those to which they were already subject as patrol officers, or that GTF officers were in fact conducting such narcotics investigations, or that City policymakers had actual knowledge that the City's training program failed to prevent its GTF officers from engaging in tortious conduct, the court concludes that plaintiffs have failed to raise a genuine issue of material fact for trial that City policymakers had actual knowledge that HPD's training regimen for GTF officers was inadequate because it failed to provide GTF officers specialized narcotics training and operating procedures.[79]

(b) Constructive Knowledge

Constructive knowledge of tortious misconduct by police officers may be attributed to a municipality if plaintiffs show that the officers' underlying constitutional misconduct was so widespread or flagrant that in the proper exercise of its official responsibilities the city's

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[78] *Id.*

[79] See *id.* at p. 21 n.3, where plaintiffs tacitly admit their inability to show that the City had actual knowledge that GTF officers engaged in a pattern of misconduct by acknowledging "that this Court is bound by the municipal liability rule on *Monell,* but they [plaintiffs] respectfully preserve a good-faith argument to change existing law and establish a rule of vicarious municipal liability."

governing body should have known of it. *See Bennett,* 728 F.2d at 768. *See also Webster,* 735 F.2d at 841.

As evidence that the City possessed constructive knowledge of the inadequacy of its GTF training program, plaintiffs cite an anonymous letter sent to former HPD Chief Sam Nuchia in January of 1995, a press release issued by Nuchia in April of 1996, and the affidavit testimony of their expert witness, Parker. Plaintiffs argue that the anonymous letter warned HPD about a "renegade band" of officers who had transformed their zero-tolerance assignment into a local undercover narcotics unit,[80] that the press release notified the public that narcotics investigations were "reserved for specially trained narcotics officers,"[81] and that Parker's affidavit demonstrates "a persistent and widespread pattern of misconduct in which the Southwest GTF conducted narcotics investigations."[82] Plaintiffs argue this evidence shows that GTF officers engaged in a pattern of misconduct that

> gave the City constructive notice that the GTF officers were conducting narcotics investigations – contrary to stated policy – and thus required either the specialized training given to narcotics

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[80] *Id.* at p. 37, citing Interoffice Correspondence of C.A. Bullock, Document 4 at p. H14556 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[81] *Id.* at p. 37, citing News Release, Document 18 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[82] *Id.* at p. 39, citing Parker Affidavit at pp. 32-36.

> officers or written guidelines expressly prohibiting them from engaging in narcotics investigations.[83]

Plaintiffs also argue that "[d]espite knowledge of these incidents, HPD took no serious action to restrain the tactical units from participating in narcotics investigations,"[84] that "in the absence of any real prohibition against conducting narcotics investigations the GTF officers continued to conduct narcotics searches,"[85] and that under these circumstances the failure to provide GTF officers either specialized narcotics training or standard operating procedures constitutes deliberate indifference to the rights of persons with whom the GTF officers come into contact.[86]

The Supreme Court has directed courts assessing a failure-to-train allegation to focus on the adequacy of the training program in relation to the tasks the particular officers must perform. *City of Canton,* 109 S.Ct. at 1206. *See also Conner,* 209 F.3d at 796-797; *Burge v. Parish of St. Tammany,* 187 F.3d 452, 472 (5th Cir. 1999). Plaintiffs make no showing that, in light of the duties assigned to GTF officers in 1998, the need for more or different training was obvious, and that this inadequacy was so likely to result in violations of constitutional rights that the City's policymakers can reasonably be said to have been deliberately indifferent to the need.

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[83] *Id.* at pp. 36-37.

[84] *Id.* at p. 37.

[85] *Id.* at p. 39.

[86] *Id.* at p. 41.

While the anonymous letter and the press release provide some evidence that in 1995 and 1996 tactical unit officers violated HPD policy, they are not evidence that the offending officers were engaging in tortious misconduct that violated the constitutional rights of citizens, or that the offending officers were placed in recurring situations for which they were inadequately trained. More importantly, this evidence shows that the offending officers failed to perform the duties to which they were assigned and that when their violations of HPD policy were discovered, "the specific guidelines . . . [were] reiterated" to the offending officers in the Southwest Patrol Division who were the subject of the anonymous letter to Chief Nuchia[87] and that in the wake of this letter and similar problems in the Northeast Patrol Division Chief Nuchia issued a policy statement that specifically prohibited officers assigned to tactical units from engaging in narcotics investigations absent direct supervision of the Narcotics Division.

Nor does the affidavit testimony of Parker establish that officers assigned to the Southwest GTF in 1998 engaged in tortious misconduct that violated the constitutional rights of citizens, or faced recurring situations for which they were inadequately trained. Parker testified that he reviewed 428 offense reports involving narcotics offenses including 33 investigations involving residences or other occupied dwellings, that during the year immediately preceding the Pedro Oregon Navarro incident

[87] Interoffice Correspondence of C.A. Bullock, Document 4 at p. H014555 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

Southwest GTF officers conducted 14 narcotics investigations involving warrantless entries into private residences, and that this pattern continued during the year following the Pedro Oregon Navarro shooting.[88] Without identifying the specific sources or offense reports on which he relies, Parker concludes that GTF officers were "regularly initiating and conducting narcotics investigations."[89] Because Parker's affidavit fails either to identify the specific sources on which his conclusions are based or to demonstrate why specific investigations initiated or conducted by GTF officers violated constitutional rights, Parker's affidavit does not show that GTF officers frequently engaged in misconduct that violated citizen's constitutional rights. *See Clark,* 110 F.3d at 297 (unsupported affidavit testimony asserting conclusory facts and conclusions of law are not sufficient to defeat a motion for summary judgment). *See also Boyd v. State Farm Insurance Companies,* 158 F.3d 326, 331 (5th Cir. 1998) (expert affidavit submitted in opposition to motion for summary judgment "must include materials on which the expert based his opinion, as well as an indication of the reasoning process underlying the opinion").

(c) Single Incident Exception

Under the "single incident exception" a single violation of federal rights may be sufficient to prove deliberate indifference. The single incident exception requires proof that officers are placed in "recurring situations that

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[88] *Id.* at p. 39, citing Parker Affidavit at p. 34.

[89] *Id.*, quoting Parker Affidavit at p. 35.

present an obvious potential for violation of constitutional rights and the need for additional or different police training." *Gabriel,* 202 F.3d at 745, *citing Bryan County,* 117 S.Ct. at 1390. *See also City of Canton,* 109 S.Ct. at 1205 n.10 (notice may be implied where failure to train officers or employees is so likely to result in a violation of constitutional rights that the need for training is plainly obvious).

Plaintiffs argue that the City's deliberate indifference to the need to provide its GTF officers specialized narcotics training may be inferred from evidence that GTF officers were placed in recurring situations that presented an obvious potential for violation of constitutional rights and the need for additional or different police training. As evidence that the City had actual knowledge that GTF officers faced recurring situations that made the need for specialized narcotics training and standard operating procedures plainly obvious, plaintiffs assert that "HPD policymakers – including the Chief of Police, assistant chiefs, and members of the City Council – routinely ordered tactical units to conduct narcotics investigations."[90] In support of this assertion plaintiffs submit excerpts from the deposition testimony of Lieutenant Zamora, the immediate supervisor of the Southwest GTF; excerpts from the administrative statement made by officer Herrada following the Pedro Oregon Navarro incident; an interoffice correspondence to Chief Bradford from Lieutenant Walker of the Northeast Patrol Division; and excerpts from Parker's affidavit testimony. Plaintiffs

[90] *Id.* at p. 34.

also assert that the City was placed on constructive notice that GTF officers were conducting narcotics investigations for which specialized training and standard operating procedures were needed by daily and monthly reports compiled by HPD that included statistics concerning arrests for narcotics offenses effected by GTF officers.

Zamora testified that he repeatedly received memos from captain Bullock concerning complaints of drug-related activity in the Gulfton area, that one memo involved a report Bullock had received from the Chief of Police regarding complaints of drug activity in an apartment complex, that Bullock ordered Zamora to investigate the complaint, and that Zamora dispatched GTF officers to the scene.[91] Officer Herrada wrote in the administrative statement made following the Pedro Oregon Navarro incident that "we were ordered to this complex to conduct narcotics investigations on a zero-tolerance level."[92] Walker wrote in his interoffice correspondence that he did not understand the role of patrol division tactical units when assigned to respond to a narcotics complaint.[93] Parker testified that GTF offense reports show that GTF

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[91] *Id.* at p. 14. See also Deposition of Harry Zamora at pp. 106-112 and Deposition of Charles A. Bullock at pp. 212-214 attached in Vol. II of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[92] *Id.*, citing Document 27 at p. H000294 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[93] *Id.* at p. 18, citing Interoffice Correspondence of R. Walker, Document 14 at p. 038083 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

officers conducted "walk throughs" of apartment complexes that invariably led to drug arrests and also created opportunities for GTF officers to enter and search apartments for evidence of narcotics violations.[94]

Plaintiffs argue that GTF officers were confused by the apparent contradiction between HPD's policy of restricting narcotics investigations to the Narcotics Division and HPD's practice of having GTF officers respond to narcotics complaints, that the confusion prompted by this contradiction placed the City on notice that the training provided to its GTF officers was inadequate, and that "[u]nder these circumstances, the need for additional training – or written guidelines clarifying the scope of GTF authority – can be said to be so obvious, that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights."[95] *See City of Canton,* 109 S.Ct. at 1205 n.10.

The court is not persuaded that plaintiffs' summary judgment evidence demonstrates that GTF officers faced recurring situations that made the need for specialized narcotics training and standard operating procedures plainly obvious or that the City's failure to provide GTF officers specialized narcotics training or standard operating procedures amounts to deliberate indifference to the rights of persons with whom the police come into contact. Plaintiffs acknowledge that "the GTF was composed of uniformed patrol officers assigned to regular patrol shifts

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[94] *Id.* at pp. 14-15 and 35. See also Parker Affidavit at pp. 34-35.

[95] *Id.* at p. 36.

who also worked overtime shifts with the GTF."[96] Although plaintiffs assert that Zamora asked GTF officers to respond to a complaint about drug dealing at an apartment complex forwarded from the Chief's office, plaintiffs fail to show that the response to this complaint differed from responses to other complaints or calls for service to which patrol officers usually respond. Plaintiffs assert that Herrada wrote in his administrative statement that he and his fellow GTF officers were ordered into apartment complexes to conduct narcotics investigations on a zero-tolerance level, but fail to reference either their own description of HPD's zero-tolerance policy as a policing strategy in which areas of the City were "saturated by uniformed officers who enforce every law, without regard to the magnitude of the offense,"[97] or their own recognition that "[o]fficers performing zero tolerance . . . routinely made traffic stops and street-level arrests"[98] typically effected by patrol officers.

Plaintiffs cite Walker's interoffice correspondence as evidence that GTF officers were confused by the contradiction between HPD's stated policy prohibiting them from performing narcotics investigations and HPD's practice of having GTF officers respond to narcotics complaints. Plaintiffs fail, however, to acknowledge that Walker's correspondence demonstrates that neither he nor his GTF officers were confused about the actions the GTF officers were authorized to take when responding to narcotics

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[96] *Id.* at p. 4.

[97] *Id.*

[98] *Id.* at p. 22.

complaints, but were instead merely dissatisfied with their inability to do more:

> We do work with the Narcotics Division Street Level Units when they are available and all drug complaints are reported to them for action. However, it seems patrol divisions are being held responsible for resolving these problems more each day. At most, patrol divisions can conduct surveillance to determine if the drug activity exists and then perform zero-tolerance and D[ifferential] R[esponse] T[eam] patrols in an attempt to address the problem. Usually, doing surveillance in a uniform, as required by the S[tandard] O[perating] P[rocedures], reveals very little and the patrol responses are a temporary fix at best. Arresting the drug dealers for the appropriate violation is the most effective response to drug complaints. However, given the current Department position relative to the Tactical Unit's involvement in drug complaints and investigations, we are limited in our efforts to resolve the problems.[99]

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[99] Interoffice Correspondence of R. Walker, Document 14 at p. H038084 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195). See also Breshears Deposition at pp. 83-84 attached in Vol. II of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195), explaining that GTF officers were exasperated rather than confused about HPD's policy regarding their roles in narcotics investigations:

> [GTF officers] had been restricted, by policy, from involving themselves in narcotics investigations directly, so that [when] they were then given complaints from citizens, "There's narcotics being sold at this location." Their question was, "What are we to do?" The answer was fairly

(Continued on following page)

Plaintiffs assert that their expert Parker reviewed 428 GTF offense reports involving narcotics offenses, including 33 investigations involving residences or other occupied dwellings, but fail to recognize that these offense reports documented approximately 237 investigations involving automobiles, approximately 224 investigations involving pedestrians,[100] or that Parker concluded the warrantless residential entries were made in violation of HPD's stated policy on narcotics investigations.[101] Plaintiffs assert that daily and weekly reports prepared for HPD command staff and federal authorities contain statistics compiled from arrests for narcotics offenses effected by GTF officers, but fail to demonstrate that these statistics show anything about the circumstances that led to the reported arrests, or the policing techniques used to effect them.

Plaintiffs' evidence merely establishes that GTF officers, like other patrol officers, can and do respond to narcotics-related complaints and that they can and do

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simple. There are tactics that they can involve themselves in, – zero tolerance tactics, high-visibility tactics – that they can go out and apply in a patrol environment that don't require a narcotics investigation to solve these problems. So, it was just a matter of reexplaining to them that their main function was a patrol function, and if they go out there and did their job as patrol officers, which is what they were assigned to do, – gang task force units were a patrol operation – then, they would be successful in wiping out some of these problems. When they weren't successful, they were to coordinate with the narcotics division, and the narcotics division was to provide the kind of undercover investigations that are necessary to solve some of these problems.

[100] Parker Affidavit at p. 33.

[101] *Id.* at p. 35, conclusions 1. and 4.

effect arrests for narcotics offenses that are either committed in their presence or discovered during the course of investigative stops. Plaintiffs' evidence does not establish that GTF officers are asked by their supervisors to initiate or undertake investigations that require use of undercover techniques, confidential informants, or search warrants for which specialized training is needed, or that GTF officers routinely conducted such investigations. On the contrary, plaintiffs' evidence establishes that GTF officers are not authorized to initiate or conduct such narcotics investigations absent supervision by the Narcotics Division, and that when GTF officers do so, they act in violation of HPD's stated policy. The court therefore concludes that plaintiffs have failed to present summary judgment evidence from which a reasonable trier of fact could conclude that the City places GTF officers in recurring situations that require either specialized narcotics training or standard operating procedures that differ from those provided to patrol officers.

2. Failure to Provide Adequate Supervision

Plaintiffs argue that the City was deliberately indifferent to the lack of adequate supervision for the GTF because the City knew that narcotics investigations require specialized supervision, knew that GTF officers were conducting narcotics investigations, and yet failed to provide GTF officers with supervisors who had been specially trained on narcotics investigations, search and seizure procedures, the use of informants, and the use of

force.[102] As evidence that the City failed to provide GTF officers adequate supervision, plaintiffs cite HPD Chief Bradford and Captain Bullock, both of whom testified that although HPD has a specialized Narcotics Division with specially trained officers and supervisors, the GTF units were supervised by the regular patrol divisions instead of by the Narcotics Division.[103] Plaintiffs cite the administrative statement of GTF Supervisor Sergeant Strouse that he knew "for a fact that [he] was never ordered not to conduct narcotics investigations"[104] and that he had not received any training in preparation for his GTF assignment.[105] Plaintiffs also cite HPD's failure to discipline Strouse for an incident that occurred before the incident at the Navarro apartment where Strouse supervised GTF officers as they initiated a traffic stop and used an arrestee to effect a warrantless entry into an alleged drug dealer's apartment.[106]

The court is not persuaded that plaintiffs' summary judgment evidence demonstrates that the City was deliberately indifferent to a lack of adequate supervision for the

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[102] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 45 (Docket Entry No. 195).

[103] *Id.*

[104] *Id.*, citing Interoffice Correspondence of D.H. Strouse, Document 31 at p. H00305 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[105] *Id.* at pp. 5 and 45, citing Interoffice Correspondence of D.H. Strouse, Document 31 at pp. H00305-H00306 attached in Vol. I of Exhibits to Plaintiffs' Response to the City of Houston's Motion for Summary Judgment (Docket Entry No. 195).

[106] *Id.* at p. 45.

GTF. The summary judgment record establishes that GTF officers were patrol officers, and that like other patrol officers, GTF officers were directly supervised by a patrol sergeant.[107] The summary judgment record also establishes that GTF patrol sergeant Strouse was a Field Training Officer and a Field Training Evaluator who assessed policing skills and knowledge of probationary officers.[108] Moreover, plaintiffs fail to present any summary judgment evidence that HPD command staff knew about the incident for which plaintiffs assert Strouse should have been disciplined. The court concludes that plaintiffs have failed to present summary judgment evidence from which a reasonable trier of fact could conclude that the City was deliberately indifferent to the lack of adequate GTF supervision.

C. Directing GTF Units to Conduct Law Enforcement Activities in a Racially Discriminatory Manner

Plaintiffs allege that HPD maintained a policy of directing GTF units to conduct law enforcement activities in a racially discriminatory manner by using the zero-tolerance strategy in the predominantly Hispanic Gulfton area, and that the execution of this policy directly caused the warrantless entry and search of the Navarro apartment and the shooting death of Pedro Oregon Navarro in violation of the Equal Protection Clause of the Fourteenth

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[107] Bradford Deposition at p. 171, Bullock Deposition at pp. 22-23, and Zamora Deposition at pp. 11-12.

[108] Affidavit of Albert Rodriguez at p. 5, Exhibit M attached to City of Houston's Motion for Summary Judgment (Docket Entry No. 180).

Amendment.[109] The City argues that it is entitled to summary judgment on this claim because plaintiffs cannot establish that HPD's use of the zero-tolerance strategy "was the moving force behind any constitutional violation based on race."[110]

1. Legal Standard

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Rolf v. City of San Antonio,* 77 F.3d 823, 828 (5th Cir. 1996), *citing City of Cleburne, Texas v. Cleburne Living Center,* 105 S.Ct. 3249, 3254 (1985) (laws aimed at mentally retarded do not create a "suspect classification"; but zoning restrictions on homes for mentally retarded persons are irrational since all asserted reasons for the restrictions apply equally to non-restricted group homes). Courts may conduct an equal protection inquiry only "if the challenged government action classifies or distinguishes between two or more relevant groups." *Rolf,* 77 F.3d at 828. The Equal Protection Clause prohibits selective enforcement of the law based on race. *Whren v. United States,* 116 S.Ct. 1769, 1774-1775 (1996). Plaintiffs claiming unequal enforcement of facially neutral statutes or policies must show both that the enforcement had a discriminatory effect and that the enforcement was motivated by a discriminatory purpose. *See United States v. Armstrong,* 116 S.Ct. 1480, 1487 (1996). *See also Home*

[109] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at pp. 1 and 52-53 (Docket Entry No. 195).

[110] City of Houston's Motion for Summary Judgment at p. 40 (Docket Entry No. 180).

Depot, Inc. v. Guste, 773 F.2d 616, 626 (5th Cir. 1985). To establish discriminatory effect in a race case plaintiffs must show that people of another race violated the law and the law was not enforced against them. *Armstrong,* 116 S.Ct. at 1487; *Home Depot,* 773 F.2d at 626-627. To establish discriminatory purpose plaintiffs must show that the policymaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Massachusetts v. Feeney,* 99 S.Ct. 2282, 2296 (1979); *Johnson v. Rodriguez,* 110 F.3d 299, 307 (5th Cir.), *cert. denied,* 118 S.Ct. 559 (1997).

2. The City's Evidence

The City argues that it is entitled to summary judgment on plaintiffs' claim that GTF officers were directed to conduct law enforcement activities in a racially discriminatory manner because plaintiffs cannot establish that "HPD's use of zero tolerance as a police strategy amounts to a racially discriminatory custom, policy, or practice."[111] The City specifically argues that plaintiffs cannot show "facts to suggest that similarly situated anglos were treated differently,"[112] or facts to suggest that "HPD's use of zero tolerance as a police strategy amounts to a racially discriminatory custom, policy, or practice because its purpose is to address all crime, impacting the group identified as criminals or suspected criminals rather than

[111] *Id.*

[112] *Id.* at pp. 38-39.

some suspect classification of individuals."[113] The City argues that the traffic stop that set in motion the events that ultimately led to the death of Pedro Oregon Navarro was initiated against Nicholas Stutes and his passengers, all of whom are "anglo."[114]

3. Plaintiffs' Evidence

Plaintiffs argue that the City is not entitled to summary judgment on this claim because the City fails to establish conclusively that it did not violate the Equal Protection Clause. Plaintiffs submit excerpts from the deposition testimony of captain Bullock and Kimbra Ogg, former Director of the Mayor's Anti-Gang Office, as evidence that the City engaged in racial profiling to execute its zero-tolerance strategy.[115] Bullock testified that the zero-tolerance strategy was used in predominately minority communities,[116] that there are an estimated 60,000 immigrants of Hispanic heritage in the Gulfton area,[117] and that while implementing the zero-tolerance strategy in the Gulfton area, the City "saturated the . . . area . . . with officers."[118] Ogg testified that the City's zero-tolerance policy is based on "visual clues," which is a euphemism for racial profiling,[119] that the City's failure to provide written

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[113] *Id.* at p. 40.

[114] *Id.*

[115] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at pp. 53-54 (Docket Entry No. 195).

[116] *Id.* at p. 53, citing Bullock Deposition at pp. 207-208, 233-234.

[117] *Id.* at p. 52, citing Bullock Deposition at p. 168.

[118] *Id.* at p. 53, citing Bullock Deposition at p. 170.

[119] Ogg Deposition at pp. 32-33.

guidelines to GTF officers posed a risk that members of minority communities would be targeted based on their appearance,[120] and that the City's zero-tolerance policy caused racial or ethnic harassment.[121] Plaintiffs argue that the City's deliberate decision not to provide proper training, procedures, and policies for GTF officers operating in the predominately Hispanic Gulfton area "proves that the City intended to discriminate against members of the Hispanic community."[122]

4. Analysis

Plaintiffs do not contend that the zero-tolerance strategy or the laws enforced pursuant to it are facially discriminatory. Instead, the gravamen of plaintiffs' argument appears to be that the City discriminated against members of the Hispanic race by choosing to use the zero-tolerance strategy in the predominantly Hispanic Gulfton area.

(a) Discriminatory Effect

The parties to this action all agree that the zero-tolerance traffic stop underlying this action was initiated against non-Hispanics. Moreover, plaintiffs present no evidence that the City's implementation of the zero-tolerance policy in the Gulfton area was used to enforce the law against Hispanics but was not used to enforce the

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[120] *Id.* at pp. 32 and 51.

[121] *Id.* at pp. 35-36.

[122] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 54 (Docket Entry No. 195).

law against non-Hispanics. The court concludes that plaintiffs have failed to show that HPD's use of the zero-tolerance strategy had a discriminatory effect on Hispanics. *See Armstrong,* 116 S.Ct. at 1487; *Home Depot,* 773 F.2d at 626-627.[123]

(b) Discriminatory Purpose

Plaintiffs do not dispute the City's assertion that the zero tolerance policy was adopted and used in the Gulfton area to combat problems posed by drug dealing activities known to occur there. Moreover, plaintiffs fail to present any evidence demonstrating that the City used the zero-tolerance strategy only in the Gulfton area, that the City used the zero-tolerance strategy only in predominantly Hispanic areas, or that the City used the zero-tolerance strategy for the purpose of discriminating against Hispanics.

Because plaintiffs present no evidence that the City's use of the zero-tolerance strategy in the Gulfton area had a discriminatory effect on Hispanics and no evidence that the City used the zero-tolerance policy in the Gulfton area for the purpose of discriminating against Hispanics, the court concludes that the City is entitled to summary judgment on plaintiffs' claim that the City denied Hispanic residents of the Gulfton area equal protection of the laws.

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[123] See Ogg Deposition at p. 51 where Ogg stated:

The risk to the members of the community is that they can be focused on unfairly, based upon appearance. I want to clarify that I don't – I'm not about to speculate that was the intent of zero tolerance. I think it was one of the practical problems associated with it.

V. Conclusions and Order

Plaintiffs argue that the shooting death of Pedro Oregon Navarro was not a random, isolated event, but was "the inevitable culmination of an unwritten policy and custom that has developed in the Houston Police Department (HPD) over the last decade."[124] In support of this argument, plaintiffs present evidence which they argue shows that the HPD adopted an unwritten custom of allowing GTF officers to conduct unconstitutional, warrantless searches of private residences in violation of the Fourth Amendment; that the City was deliberately indifferent to the risk that the Southwest GTF officers were inadequately trained and supervised in violation of the Due Process Clause of the Fourteenth Amendment; and that the City directed GTF officers to enforce the laws in a racially discriminatory manner in violation of the Equal Protection Clause of the Fourteenth Amendment. After carefully reviewing the summary judgment record, the court concludes that plaintiffs have failed to present competent summary judgment evidence from which a reasonable trier of fact could conclude that the City had an official policy of allowing GTF officers to conduct unconstitutional searches of private residences in violation of the Fourth Amendment, that the City had an official policy of providing inadequate training or supervision to the GTFs, or that the City had an official policy of directing GTF officers to conduct law enforcement activities in a racially discriminatory manner. Accordingly, the court concludes

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[124] Plaintiffs' Response to the City of Houston's Motion for Summary Judgment at p. 2 (Docket Entry No. 195).

that the City is entitled to summary judgment on plaintiffs' claim that the City violated the civil rights of Pedro Oregon Navarro. The City of Houston's Motion for Summary Judgment (Docket Entry No. 180) is **GRANTED**.[125]

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[125] The live claims remaining in this case are those claims asserted by the estate of Pedro Oregon Navarro against HPD officers Barrera and Herrada for excessive use of force and wrongful death brought pursuant to 42 U.S.C. § 1983, and the Texas Wrongful Death Statute, Tex. Civ. Prac. & Rem. Code §§ 71.001 *et seq.*; against all the individual HPD officer defendants for conspiracy and wrongful entry and search brought pursuant to 42 U.S.C. § 1983; against Sergeant Strouse for failure to supervise brought pursuant to 42 U.S.C. § 1983; and the crossclaims asserted by the individual officers against the City and by the City against the individual officers. Although ¶ 57 of Plaintiffs' Second Amended Complaint (Docket Entry No. 76) suggests that the estate of Pedro Oregon Navarro has also asserted a claim pursuant to the Texas Wrongful Death Act against the City of Houston, the table of claims attached as an appendix to Plaintiffs' Second Amended Complaint (Docket Entry No. 76) shows that the estate has asserted claims pursuant to the Texas Wrongful Death Statute only against officers Barrera and Herrada.

The parties fully briefed the issues addressed in this Opinion and Order, and the court has expended considerable time reading these papers and performing independent research in order to be as fully informed as possible when addressing the parties' arguments. While, because of the sheer volume of information presented the court may not have expressly addressed each and every argument presented by the parties, the parties should assume that failure to expressly address a particular argument in this Opinion and Order reflects the court's judgment that the argument lacked sufficient merit to warrant discussion. Accordingly, the court strongly discourages the parties from seeking reconsideration based on arguments they have previously raised or that they could have raised.

SIGNED at Houston, Texas, on this 6th day of December, 2000.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLAUDIA NAVARRO PINEDA, et al. *Plaintiffs*	§	
vs.	§	JAN 25 2001
THE CITY OF HOUSTON, et al., *Defendants*	§	Civil Action: H:98-3877

RULE 54(b) ORDER

This is a civil rights lawsuit involving multiple claims against multiple defendants. On December 6, 2000, this Court granted summary judgment for the City of Houston, disposing of all the Plaintiffs' claims against the City. The Court has expressly determined "there is no just reason for delay" of the appeal from its final judgment on these claims. FED. R. CIV. P. 54(b). Therefore, the Court expressly directs the entry of final judgment for the City on all claims asserted by the Plaintiffs.

Pursuant to Federal Rule of Civil Procedure 54(b), this is a FINAL JUDGMENT as to all claims asserted by the Plaintiffs against the City of Houston. All other claims among the parties are ABATED until after the appeal from this Court's summary judgment in favor of the City, or until further order of this Court.

SIGNED this 24th day of JANUARY, 2001.

/s/ Sim Lake
Honorable Judge Sim Lake
U.S. District Court

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20189

CLAUDIA NAVARRO PINEDA, Etc; ET AL

Plaintiffs

CLAUDIA NAVARRO PINEDA, Individually, Representative of the Estate of Pedro Oregon Navarro; ANA ISABEL LORES as next friend of Ashley, minor daughter of Pedro Oregon Navarro; BLANCA LIDIA VIERA, as Next friend of Belinda, minor Daughter of Pedro Oregon Navarro; SUSANA OREGON NAVARRO

Plaintiffs-Appellants

v.

CITY OF HOUSTON; ET AL

Defendants

CITY OF HOUSTON

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING

(Filed Aug. 13, 2002)

Before KING, Chief Judge, and GARWOOD and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Pat Higginbotham
United States Circuit Judge

Case No. 01-20189

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLAUDIA NAVARRO PINEDA, etc; et al
Plaintiffs

CLAUDIA NAVARRO PINEDA, Individually, Representative of the Estate of Pedro Oregon Navarro; ANA ISABEL LORES, as next friend of Ashley, minor daughter of Pedro Oregon Navarro; BLANCA LIDIA VIERA, as next friend of Belinda, minor daughter of Pedro Oregon Navarro; SUSANA OREGON NAVARRO
Plaintiffs-Appellants

v.

CITY OF HOUSTON; et al
Defendants

CITY OF HOUSTON
Defendant – Appellee

Appeal From The United States District Court
For the Southern District of Texas, Houston Division

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STATEMENT OF FACTS

Because this is a fact-intensive case, Appellants provide a detailed statement of facts recounting, *first*, the fatal shooting of Pedro Oregon Navarro, and *second*, the policy of the Houston Police Department that caused it.

I.

This case arises out of a warrantless search that resulted in the fatal shooting of Pedro Oregon Navarro. The City does not dispute that its officers violated the Fourth Amendment. *See* R 6:4664-65, 8:4113-15; DE 195, Vol. I at 24:H45-46. Even the Chief of Police called their actions "illegal" and an "egregious" example of police misconduct. R 6:4644, 4665.

A "Routine" Traffic Stop Nets An Eager Informant

On July 11, 1998, Houston police officers Pete Herrada and J. R. Willis were patrolling southwest Houston when they stopped a car for alleged traffic violations. DE 54 at 2:H1518. They arrested Ryan Baxter, a convicted felon on probation for possession of crack cocaine. *Id.* Hoping to avoid having his probation revoked, Baxter volunteered to turn over his alleged drug supplier in

exchange for his release. DE 54 at 11:H291-92, 13:H314. Although Baxter was not a qualified informant, DE 54 at 1:H42-43, the officers quickly agreed, promising to release Baxter if he led them to his alleged drug supplier. DE 54 at 9:H1665, 1668, 1:H42-43.

The officers then contacted the members of their unit – the Southwest Gang Task Force – to organize a drug sting. DE 54 at 21:H302, 12:H1658, 15:H297. Four officers – Sergeant Darrell Strouse and officers David Perkins, Lamont Tillery, and David Barrera – answered their call. DE 54 at 12:H1658, 20:H1655, 25:21. Although Sergeant Strouse admitted he "did not have any idea" how to conduct a narcotics investigation, DE 54 at 21:H303, he agreed to use Baxter as an informant and allowed him to set up the alleged drug dealer. DE 54 at 21:H303-04.

The "Plan of Action"

Rather than seek a search warrant, the officers agreed on a "plan of action": Baxter would arrange a meeting with his alleged supplier at a local Jack-in-the-Box, creating a pretext for the officers to search his car. DE 54 at 25:26-27, 13:H315, 19:H286. But when the alleged supplier failed to appear, that plan was abandoned. DE 54 at 2:H1518.

Rather than now seeking a warrant, the GTF officers ordered Baxter to take them to his alleged supplier's apartment, where the officers devised a new plan: Baxter would knock on the front door while the officers waited beneath the stairs. When the door was opened, Baxter was instructed to fall to the ground to prevent the door from being closed. The GTF officers would then rush into the apartment. DE 54 at 3:H1550, 2:H1518-19, 9:H1665, H1669, 20:H1655, 21:H303-04.

Into the Breach

As Baxter knocked on the door, the GTF officers waited beneath the stairs. DE 54 at 3:1558-60. When the door opened, Baxter did as he had been instructed: he fell to the floor in the doorway, and the officers rushed into the apartment without stopping to request consent. DE 54 at 9:H1665, H1669, 22:H1671.

Officers Herrada and Willis were the first to enter the Oregon apartment. Officer Willis seized the man who had opened the door, Rogelio Oregon Navarro. DE 54 at 12:H1659, 13:H316-17. Rogelio stated Willis "rushed into my apartment and pointed a gun at me, telling me not to move. I put my hands out in front of me and the officer then struck me in my face, with his fist." DE 54 at 22:1671. Herrada claims he observed a second man fleeing toward a closet and seized him. DE 54 at 10:H1653-54, 11:H294, 12:H1659, 13:H316-17. This unidentified second man was Salvador Lopez, another resident of the apartment. DE 54 at 2:H1519. The other officers followed and rushed to the rear of the apartment.

There were two bedrooms in the rear of the apartment. Rogelio's girlfriend, Nelly Mejia, was in one bedroom. In the other bedroom was Rogelio's brother, Pedro Oregon Navarro. Prior to this commotion, Pedro had not left his bedroom. DE 54 at 22:H1671-72, 23:H1675-76.

Officer Perkins was the first to reach the bedrooms. Finding Pedro's door locked, he turned into the other room and seized Ms. Mejia. DE 54 at 14:H1650, 15:H299, 25:52-54. Officer Tillery followed and – without any warning or a request to enter – kicked in Pedro's bedroom door. DE 54 at 16:H1646, 17:H3093:H1533, H1539 (homicide report

noting the bedroom door had been locked with a deadbolt, but was splintered from being kicked in).

The Shooting of Pedro Oregon Navarro

The only living witnesses to what happened next are the officers themselves. Although the room was dark, Officer Tillery says that he saw a man pointing a gun. Simultaneously, Officer Barrera came up from behind and shot Tillery in the back. DE 54 at 2:H1519, 16:H1647, 17:H309, 18:H1648-49, 19:H288. Ballistics reports confirm that Officer Barrera fired the first shot, shooting Officer Tillery in the back. DE 54 at 3:H1527-29, H1548, H1551.

Allegedly believing the officers were under fire, Barrera fired sixteen times, emptying the entire magazine of his revolver into the bedroom. DE 54 at 18:H1649, 19:H288, 3:H1548. When this firing erupted, Officer Perkins turned from where he had detained Ms. Mejia and saw Barrera firing into the room "at a rapid pace." DE 54 at 15:H299. As Barrera paused to reload, Perkins charged to the doorway and saw Pedro running across the bedroom in a futile effort to evade the gunshots. DE 54 at 14:H1650, 15:H299, 25:60-67. Perkins admits that he never saw a gun. Nonetheless, Perkins fired several shots. DE 54 at 14:H1650, 15:H299, 25:65-67. Herrada also came to the bedroom door and fired several shots into the bedroom. DE 54 at 10:H1654, 11:H295.

By this time, Barrera had reloaded his revolver and resumed firing at Pedro, who had already fallen to the floor – face down – almost at the feet of the officers. DE 54 at 18:H1649, 19:H288. Barrera fired eight more shots at point-blank range. DE 54 at 3:H1548. Ms. Mejia observed him from the bedroom across the hall, "pointing his pistol

at a guy who was on the floor of the bedroom right across from where I was at." DE 54 at 23:H1675-76.

When the shooting ended, Pedro Oregon Navarro lay dead in the doorway. DE 54 at 3:H1546, 15:H299, 21:H304, 25:71-72. Police diagrams illustrating the position of Mr. Oregon's body and the spent shell casings show that Pedro was shot at almost point-blank range. DE 54 at 8:H1717-20. Mr. Oregon was face down, with his hands "bent up and resting on each side of his head." DE 54 at 3:H1539; *see also id.* at 3:H1532-33, H1546.

A pistol was found near Mr. Oregon's body, identical to one Officer Tillery carried as his second, personal gun. DE 54 at 3:H1531-33. It had not been fired. DE 54 at 3:H1551, 2:H1519. No drugs were found. D. Ct. Op. at 3.

The Autopsy Reports

The autopsy report found that Pedro was killed by twelve gunshot wounds: one in the top of the head – one in the neck – one in the hand – and nine in the back. DE 54 at 4:H1751-53, 2:1519-20; *see also* DE 54:6 (diagrams of gunshot wounds). A second autopsy, requested by the family, corroborated the official autopsy report and concluded that several gunshots had struck Pedro in the back while he was lying prone on the floor. "The general direction of the bullets through the body is from back to front and downward. This would be consistent with the decedent being on the floor in a face down, prone position with the shooter above and in front of him shooting downward." DE 54 at 5:6; *see also id.* at 7:H1853. His death was ruled a homicide. DE 54 at 4:H1747.

II.

The fatal shooting of Pedro Oregon Navarro was not a random, isolated event. It was the inevitable culmination of an unwritten custom that has developed in the Houston Police Department (HPD) over the last decade. The district court correctly found that there is sufficient evidence to establish a pattern of police misconduct. *See* D. Ct. Op. at 41.

HPD Implements the Zero Tolerance Policy

Pedro Oregon Navarro lived in the Southwest Houston community of Gulfton. R 7:4306, 4461, 4469. Most residents of the Gulfton neighborhood are Hispanic. R 7:4306, 4469. In the mid-1990s, the Gulfton area was infested with drug dealers, who did business out in the open, on the streets. R 7:4460, 4467, 4469.

In 1992, HPD implemented a "zero tolerance" strategy in high-crime areas. R 7:4349, 4453. "Zero tolerance" is a controversial tactic in which a community is saturated with uniformed officers who enforce every law, without regard to the magnitude of the offense. R 6:4657; 7:4351. One of the pilot programs for the zero tolerance strategy was implemented in the Gulfton area. *See* DE 195, Vol. I at 12; R 7:4348-49.

HPD Creates the Gang Task Force

In 1994, HPD created a new unit, the Gang Task Force (GTF). R 7:4354. The mission of the GTF is to identify gang activity and suppress it through high visibility and "zero tolerance" enforcement of all laws and municipal ordinances. R 6:4617; 7:4315-16, 4351, 4496.

When the GTF was created, the Chief of Police ordered it to go "*into the gray area*, up to the line, of arrest, search and seizure." R 7:4335 (emphasis added). Even more bluntly, the Chief instructed the GTF to "push the envelope." R 7:4305.

As noted above, the particular unit involved this case is the Southwest GTF, whose special mission was to suppress gang activity in the Gulfton area. R 7:4351. In addition, the Southwest GTF also assisted with narcotics enforcement efforts. Because of the high crime rate in the Gulfton area, HPD targeted it for special programs funded by federal grants, which focused on eliminating drug trafficking. R 7:4316, 4461, 4467, 4471, 4494. GTF officers were active participants in this "Weed and Seed" program. R 6:4643, 4657; 7:4462, 4495.

HPD Decides Not to Provide Training or Written Guidelines for the GTF

Because of its aggressive nature, zero tolerance has been widely criticized for infringing on constitutional liberties. *See* DE 195, Vol. I at 3-4; R 6:4614; 8:4117. Indeed, the Chief of Police admitted that, while all police officers have power that generates a risk of abuse, zero tolerance is "more likely to attract it." R 7:4347. Yet HPD did not provide any written guidelines to the GTF officers explaining the zero tolerance strategy, nor did it provide any written guidelines advising them how far they could "push the envelope" without violating constitutional rights of citizens. R 7:4348-50.

In addition, HPD did not require any specialized training for the GTF about search and seizure procedures, the use of confidential informants, the use of force, or

narcotics investigations.[1] Nor did HPD provide standard operating procedures or written guidelines to help define the GTF's duties and the limits of its authority.[2]

In 1995, GTF officers told the HPD command staff that they needed standard operating procedures and specialized training. *See* DE 195, Vol. I at 11; R 6:4616, 4653. There was "general consent" among the patrol assistant chiefs and captains "that this issue needs to be addressed and SOPs developed." DE 195, Vol. I at 11. Attached to this proposal was a "Gang Task Force survey" regarding the need for training, a training manual, standard operating procedures, and written guidelines. *Id.* Despite the request for guidelines from its own officers, the HPD command staff deliberately decided *not* to promulgate standard operating procedures for the GTF. R 6:4613-14, 4616, 4618-19.

The Renegade Band in the Southwest Division and the Scandal in the Northeast Division

The zero tolerance strategy soon led to numerous incidents of police abuse. In 1995, the Chief of Police received a anonymous letter from a "veteran officer" about a "policy and safety hazard at the Southwest Division." DE 195, Vol. I at 4; R 7:4345-46, 4489. The officer warned of

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[1] *See, e.g.*, DE 195, Vol. I at 26:H289, 27:H295, 28:H318, 30:H310, 31:H305; *see also id.* at 7 (GTF officers' training records); R 6:4649, 4652, 4660-62, 7:4466, 4473, 8:4016-20, 4026, 4029.

[2] *See, e.g.*, DE 195, Vol. I at 15:2-3; R 6:4611, 4616-19, 4660, 7:4313-14, 4343, 4348, 4351, 4353, 4453, 4462, 4464.

the danger posed by inadequately trained overtime units conducting zero tolerance enforcement in the Gulfton area:

> . . . . [A] renegade band of Officers led by a Sergeant, took it much further. They gave themselves a name, "Criminal Apprehension Team", CAT for short. . . . They began to work plainclothes assignments, primarily narcotics investigations. These Officers are very young and with no formal training, other than what they received in the Police Academy.
>
> Now, they have crossed over into Undercover Narcotics Officers. They are making undercover buys and buy busts. . . . When you took over the command of this department, one of the first orders that you issued, was to place all Tactical Units back in uniform. They were ordered not to make any undercover buys or buy busts. You stated that this was the function of our Street Level Narcotics Units. You cited safety and policy reasons for making this change. So now you have young untrained highly aggressive Police Officers making undercover investigations. Recent history of the Tactical Units in Southeast and Northeast that were involved in controversy, will show where this could all lead. A good young Police Officer, who is misled can get himself hurt or in trouble.
>
> I have notified my supervisors of the situation and they have passed their concerns up the chain but still nothing has been resolved. My intention is not to get anyone in trouble. I am trying to prevent a scandal before one happens. I trust that you will resolve this dangerous situation.

DE 195, Vol. I at 4.

An internal investigation confirmed these allegations. An overtime unit of patrol officers assigned to perform zero tolerance – like the Southwest GTF – was instead conducting improper undercover narcotics operations. DE 195, Vol. I at 4; R 7:4486, 4488. Yet HPD imposed no disciplinary measures, offered no additional training, and implemented no guidelines to prevent similar incidents in the future. R 7:4345, 4487-88.

At the same time as the "renegade band" appeared in the Southwest Division, similar problems arose in the Northeast Division. The tactical units in that division were also doing unauthorized undercover narcotics investigations. R 6:4646, 4652. An investigation exposed several "common problems," such as overzealous officers, unauthorized narcotics investigations, inadequate supervision, misuse of informants, mishandled evidence, and falsification of offense reports to cover up the misconduct. R 7:4344-45; DE 195, Vol. I at 17.

In a press release announcing this scandal to the public, the Chief of Police informed the public that "undercover narcotics work and dealing with informants and search warrants are complex tasks, requiring special knowledge and skills. That's why those things are – by my orders – reserved for specially trained narcotics officers." DE 195, Vol. I at 18; R 6:4653, 7:4342.

Nonetheless, the Southwest GTF officers received no written guidelines or standard operating procedures preventing them from doing narcotics investigations. *See* DE 195, Vol. I at 15; R 6:4613, 7:4342, 4484, 8:3946, 3950-51. Therefore, none of the officers involved in the Oregon shooting were ever told they could not work narcotics investigations. *See* DE 195, Vol. I at 26:H288-89, 27:H295,

28:H318, 29:H300, 30:H310, 31:H305; R 6:4656-57. Sergeant Darrell Strouse, commander of the Southwest GTF, knew "for a fact that I was never ordered not to conduct narcotics investigations." DE 195, Vol. I at 31:H305. On the contrary, because they were participating in the federal drug enforcement program, the GTF believed that they *were* authorized to conduct narcotics investigations. *See* DE 195, Vol. I at 27:H295, 28:H318; R 7:4471.

The Southwest Division Shifts Its Focus to Drug Dealers in Apartment s [sic]

When zero tolerance efforts first began in the Gulfton area, most of the drug trafficking occurred on the street. R 7:4467. Over time, the zero tolerance strategy reduced the amount of open-air, street-level narcotics activity in the Gulfton area, driving drug dealers from the streets into the apartments. R 7:4460, 4470; *see also* DE 195, Vol. I at 21.

In 1998, the Southwest Division responded to this development by shifting its efforts to focus on dealers in the apartments. *See* DE 195, Vol. I at 21; R 4460, 4462, 4470. Street-level enforcement efforts would focus on developing informants from suspects arrested for minor infractions, to reach the dealers in the apartments. *See* DE 195, Vol. I at 22; R 7:4306, 4462. These street-level enforcement efforts, including the development of informants, would be conducted by officers such as the Southwest GTF. *See* R 7:4462; DE 195, Vol. I at 21. Under this strategy,

> it should be possible to target persons who are good candidates for informants and offer them the option of serving as contract informants.

> With these persons it will be possible to work our way up the 'food chain' of narcotics traffickers to reach persons whose arrests will have a significant impact on the street level sales of drugs in the area.

DE 195, Vol. I at 22:H16174. Although the Narcotics Division declined a request to include its undercover officers in this operation, *see* R 7:4456, 4460, 4467-70, the strategy soon manifested itself in a series of warrantless residence searches.

The Southwest GTF Conducts Unconstitutional Residence Searches

Officers in the Southwest Division were under pressure to produce results in narcotics enforcement. Lieutenant Zamora, the supervisor of the Southwest GTF, received regular memos from his superiors about complaints of drug-related activity in the Gulfton area. R 8:3971. In one case, Lieutenant Zamora received a complaint about drug activity in an apartment complex directly from the Chief of Police. Lieutenant Zamora sent the Southwest GTF to investigate this narcotics complaint. R 7:4463; 8:3968-71. The GTF officers entered an apartment without a warrant and made a drug bust. R 8:3968-71; DE 195, Vol. I at 28:H317. As one of the officers explained, "we were ordered to this complex to conduct narcotics investigations on a zero-tolerance level." DE 195, Vol. I at 27:H294.

This was not an isolated incident. The Southwest GTF was often dispatched to conduct "walk-throughs" of the apartment complexes around the Gulfton area, and it often patrolled the apartment premises. *See, e.g.*, DE 195, Vol. III at 21-73; R 7:4188-89. As the GTF reports attest,

these "walk-throughs" invariably led to drug arrests. *Id.* On several occasions, they also created opportunities for the GTF to enter and search apartments for narcotics. *See, e.g.*, DE 195, Vol. III at 1-14. As a result, Sergeant Strouse admitted that "[t]he Gang Task Force has entered other residences to search for drugs." DE 195, Vol. I at 31:H304. Consistent with the new focus of the Southwest Division on attacking drug dealers in the apartments, these narcotics searches occurred with increasing frequency in the spring of 1998, during the months preceding this tragedy. *See* DE 195, Vol. III at 3-8; R 7:4416. They reached a fateful climax in July 1998, with the warrantless search of the Oregon apartment and the needless death of Pedro Oregon Navarro.

> – Brief for Appellants in Case No. 01-20189, *Claudia Navarro Pineda et al. v. City of Houston et al.*, in the United States Court of Appeals for the Fifth Circuit, at 5-17

* * *

The Appellants recognize that this Court is bound by the municipal liability rule of *Monell*, but they respectfully preserve a good-faith argument to change existing law and create a vicarious liability rule for Section 1983. *See Bryan County*, 520 U.S. at 430-47 (Breyer, Stevens, and Ginsburg, JJ., dissenting).

> – Brief for Appellants in Case No. 01-20189, *Claudia Navarro Pineda et al. v. City of Houston et al.*, in the United States Court of Appeals for the Fifth Circuit, at 21 n.3.

* * *

In its performance evaluations of the officers, HPD found the GTF officers involved in this case exhibited a

"lack of knowledge" of proper search and seizure procedures which "resulted in the death of a citizen." Doc. 195, Vol. I at 16:H15214-19; R 6:4660-61; R 8:4035-36.

– Brief for Appellants in Case No. 01-20189, *Claudia Navarro Pineda et al. v. City of Houston et al.*, in the United States Court of Appeals for the Fifth Circuit, at 41-42.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLAUDIA NAVARRO PINEDA, et al.	§	
	§	Civil Action:
Plaintiffs	§	H:98-3877
	§	
vs.	§	(Filed Sep. 22, 2000)
	§	
THE CITY OF HOUSTON, et al.	§	
	§	
Defendants	§	

PLAINTIFFS' RESPONSE TO THE CITY OF HOUSTON'S MOTION FOR SUMMARY JUDGMENT

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* * *

Plaintiffs acknowledge that this Court is bound by the municipal liability rule of *Monell*, but they respectfully preserve a good-faith argument to change existing law and establish a rule of vicarious municipal liability. *See Bryan County*, 520 U.S. at 430-47, 117 S. Ct. at 1401-04 (Breyer, Stevens, and Ginsburg, JJ., dissenting).

– Plaintiffs' Response to the City of Houston's Motion for Summary Judgment in Civil Action H:98-3877, *Claudia Navarro Pineda et al. v. City of Houston et al.*, in the United States District Court for the Southern District of Texas, at 21 n.3.

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